(30,460)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 495

GEORGINE ISELIN, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS.

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[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

No. B-96

GEORGINE ISELIN

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On May 10, 1922, the plaintiff filed her original petition.

On July 10, 1922, a general traverse was entered under Rule 34.

Subsequently, to wit, on April 20, 1923, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

II. AMENDED PETITION AND EXHIBITS—Filed April 20, 1923

To the Honorable the Court of Claims:

The claimant in the above entitled cause respectfully represents:

1. That at all times material to this action the claimant was and now is the owner of three hundred shares of the capital stock of Metropolitan Opera and Real Estate Company (hereinafter referred to as the Metropolitan Company), a corporation organized under the laws of the state of New York and having its principal office at No. 150 West 40th Street, borough of Manhattan, city of New York, county of New York and state of New York.

[fol. 2] 2. That the objects of the Metropolitan Company are stated in its certificate of incorporation, a copy of which is hereto annexed and made a part hereof and marked Exhibit A.

3. That at all times material to this action the Metropolitan Company owned and now owns the premises known as the Metropolitan Opera House in the block bounded by Broadway, Seventh Avenue, Thirty-Ninth and Fortieth Streets, in the borough of Manhattan, city of New York.

4. That in and by a certain lease and agreement, dated April 3, 1908, a copy of which is hereto annexed and made a part hereof and marked Exhibit B, and which is still in full force and effect, the Metropolitan Company leased the said Opera House and other property to the Conried Metropolitan Opera Company, the name of which was later changed to Metropolitan Opera Company (hereinafter referred to as the Opera Company), a corporation organized under the laws of the state of New York. That under the terms of said lease and agreement, the Opera Company agreed to reserve for

the use of the Metropolitan Company or such persons as it might designate, at every representation of Grand Opera given during the term of said lease, all of the boxes situated on the parterre tier of the said Opera House; and Opera Company further agreed that "Six free admissions shall be allowed for each of the parterre boxes reserved as aforesaid." That under the terms of said lease and agreement, the Opera Company, in consideration of the letting of the property referred to in said lease and agreement, covenanted to pay the Metropolitan Company a yearly rent or sum of $67,000. That under the terms of said lease and agreement, and as a condition thereof, the Opera Company covenanted to give a season of not less than sixty and not more than seventy regular representations of grand opera [fol. 3] at the said Opera House in each year of the term of said lease. That under the terms of said lease and agreement, the Metropolitan Company covenanted and agreed to pay to the Opera Company as a subsidy the sum of $1,000 for each of the regular performances of grand opera to be given as provided therein. That during all the times material to this action such subsidy amounted to $70,000 for each season, which was duly paid.

5. That at all times material to this action the by-laws of the Metropolitan Company have contained and now contain the following provision:

Article VII

Section 4. Each holder or holders of three hundred shares of stock shall have a license to use a designated box upon the parterre tier of the opera house. The license to use a box, above referred to, shall entitle the Stockholder or Stockholders, to whom such box is allotted, to occupy the box at all representations of Grand Opera, subject to such assessments and under such general rules and regulations as the Board of Directors may, from time to time, determine. No Stockholder who is indebted to the Company shall be allowed to use his box until such indebtedness is fully paid.

6. That the stockholders of the Metropolitan Company entered into an agreement, dated March 7, 1893, with the Metropolitan Company and with the New York Guaranty and Indemnity Company, as Trustee, a copy of which agreement is hereto annexed and made a part hereof and marked Exhibit C. That said agreement provides among other things:

"First. The stockholders, each for himself and his or her representatives, executors, administrators and assigns, severally agree with each other, and with the Company [i. e. the Metropolitan Company], [fol. 4] that they will, from time to time, contribute to and for the use of the said Company, such amounts of money (not exceeding ten dollars for each share of stock in any one year) as the Directors of the said Company may in their discretion see fit to call for."

7. That the stockholders of the Metropolitan Company entered into a further agreement, dated February 15, 1916, with the Metropolitan Company and with the Guaranty Trust Company of New York (successor to the New York Guaranty and Indemnity Company), as Trustee, a copy of which is hereto annexed and made a part hereof and marked Exhibit D. That said agreement provides among other things:

"First. Such of The Stockholders of The Company [i. e. the Metropolitan Company] as shall sign this agreement, each for himself and his or her representatives, executors, administrators and assigns, severally agree with each other and with The Company, that they will, from time to time, contribute to and for the use of The Company such amounts of money in addition to the assessments provided for in said agreement of March 7, 1893 (not exceeding however the additional sum of five dollars for each share of stock in any one year), as the directors of The Company may in their discretion see fit to call for."

8. That on or about March 28, 1905, the claimant became the owner and holder of three hundred shares of the capital stock of the Metropolitan Company, and thereby acquired a license to use the box numbered 15 upon the parterre tier of the said Opera House. That at all times thereafter the claimant continued to own and now owns said shares of stock and the license to use said box.

9. That pursuant to the provisions of the by-laws set forth in paragraph 5 above, and to the rules and regulations of the Board of [fol. 5] Directors of the Metropolitan Company, the claimant duly signed and became a party to each of said agreements, Exhibits C and D. That in each and every year during which the claimant has held said stock in the Metropolitan Company she has duly paid the annual assessment called for by the Directors of the Metropolitan Company and has been allowed to use said box; that in November, 1919, the Directors called for an assessment of $3,000, which the claimant duly paid.

10. That the Metropolitan Company has never realized any annual profit, and has never distributed any profits to its stockholders.

11. That, in consideration of the sum of $9,525, the claimant transferred the license to use said box for forty-seven performances during the grand opera season extending from November, 1919, to April, 1920, both inclusive; said consideration is computed as follows:

1 opening night performance	$550.00
11 Monday night performances at $275 each	3,025.00
11 Monday night performances at $200 each	2,200.00
23 Friday night performances at $150 each	3,450.00
1 "Prince of Wales" performance, November 18, 1919	300.00
47	$9,525.00

12. That prior to the opening of said opera season, the claimant employed Frank N. Dodd to obtain and submit to the claimant the names of persons who desired to occupy said box at representations of grand opera during the said season; that said Frank N. Dodd did submit to the claimant the names of such persons, and thereafter the claimant transferred the license to use said box to such persons for the above stated performances in consideration of the above stated amounts. That said Frank N. Dodd duly delivered the cards of [fol. 6] admission to said box to such purchasers and received and transmitted to the claimant the proceeds of such sale, after deducting a commission for such services. That said Frank N. Dodd, in disposing of the cards of admission to the claimant's box, acted solely as agent of the claimant and not as a proprietor, manager or employee of any opera house, theatre or other place of amusement. That the claimant is not now and never has been a proprietor, manager or employee of any opera house, theatre or other place of amusement. That the license to use the claimant's box, or any box on the parterre tier of said Opera House, was not purchasable at the ticket office of said Opera House or at any ticket office. That the license to use the claimant's box or any box on the parterre tier of said Opera House was not purchasable at any news stand or hotel, or at any other place except upon application to said Frank N. Dodd or to the individual stockholder.

13. That on or about August 4, 1919, the attorneys for the Metropolitan Company requested the Commissioner of Internal Revenue to issue a ruling with respect to the application of Section 800(a) of the Revenue Act of 1918 to transactions such as are set forth above; that under date of December 24, 1919, the Commissioner of Internal Revenue ruled as follows:

"Any stockholder of the Metropolitan Opera and Real Estate Company selling a ticket for admission to any of the boxes in question, whether direct or through the Opera House box office, is subject to the tax imposed by paragraph (3) of this section of the statute and must mark such ticket in accordance with article 51 of the enclosed Regulations. The basis for computing this tax is the difference between the established price of the box seat in the second tier for that performance, as determined by article 17 of the enclosed Regulations, and the price for which the ticket is sold."

That the established price at which the boxes situated in the second tier, which is the tier above the parterre boxes in the said Opera [fol. 7] House, and known as the grand tier boxes, were sold for the performances mentioned in paragraph 11 hereof at the box office to the general public was $60 for each performance. That $60 was not the regular or established price or charge of the claimant's box for such performances or the established price therefor at any ticket office or offices; and that there was no regular or established price or charge therefor, and no established price therefor at any ticket office or offices.

14. That in compliance with said ruling, the claimant, on or about January 28, 1920, made a return to the Collector of Internal Revenue for the Second District of New York, setting forth said transactions, and the claimant paid to said Collector of Internal Revenue the sum of $3,352.50, being a tax equal to 50 per centum of the excess of said sum of $9,525 over an amount equal to $60 for each of said forty-seven performances, said return being filed and said payment being made under protest and because of duress, and in order to avoid the imposition of penalties. That thereafter, on October 23, 1920, the claimant presented to the Commissioner of Internal Revenue, a claim for the refunding of said tax and alleged the same to have been erroneously or illegally collected. That said claim for refund was duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. That on or about May 27, 1921, the Commissioner of Internal Revenue rendered a decision on said claim and rejected the same, ruling that said alleged tax was payable under the provisions of paragraph (4) of Section 800 (a) of the Revenue Act of 1918.

15. That no action has been taken on this claim in Congress or by any of the Departments except as aforesaid; that no person other than the claimant is the owner thereof or interested therein; that no as-
[fol. 8] signment or transfer of said claim or of any part thereof or interest therein has been made; that the claimant is justly entitled to the amount herein claimed, to wit, the sum of $3,352.50, from the United States after allowing all just credits and offsets; that the claimant is a citizen of the United States and has at all times borne true allegiance to the government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government; and that she verily believes the facts as stated in this petition to be true.

Wherefore, the claimant demands judgment against the United States for the said sum of $3,352.50, with interest.

Rushmore, Bisbee & Stern, Attorneys for Claimant.

Jurat showing the foregoing was duly sworn to by Chas. P. Howland omitted in printing.

[fol. 9] EXHIBIT A TO AMENDED PETITION

STATE OF NEW YORK,
City and County of New York, ss:

We, the undersigned, desiring to form a corporation pursuant to the provisions of The Business Corporations Law, all being of full age, and two-thirds being citizens of the United States, and a majority residents of the State of New York, do hereby certify:

I. The name of the proposed corporation is: Metropolitan Opera and Real Estate Company.

II. The objects for which it is to be formed, including the nature and locality of its business, are as follows: To encourage and cultivate a taste for music, literature and the arts, and to erect, maintain purchase or rent, a building or buildings for that purpose; to give, or cause to be given, operatic or dramatic representations, concerts, balls, and other entertainments; to acquire and maintain an opera house with all suitable equipment and with adjacent meeting rooms, ball rooms and other apartments; to lease, own and hold real estate adjacent to such opera house; to improve the same by the erection of buildings thereon; to manage the adjacent buildings, and carry on therein a hotel or apartment house with a restaurant and other facilities connected therewith; to rent and dispose of rooms, apartments or stores in such buildings, and to purchase and acquire all the real and personal property of the Metropolitan Opera House Company of New York (Limited) and the Metropolitan Improvement Company of New York (Limited); all in the City and County of New York.

III. The amount and description of the capital stock are as follows: One Million and Fifty Thousand Dollars in common stock.

[fol. 10] IV. The number of shares of which the capital stock shall consist is ten thousand five hundred, each of which shall be one hundred dollars.

V. The location of its principal business office is in the City and County of New York.

VI. Its duration shall be fifty years.

VII. The number of its directors shall be thirteen.

VIII. The names and post office addresses of the directors for the first year are as follows (all of said addresses being in the City of New York):

Names	Addresses
Samuel D. Babcock	32 Nassau Street.
George F. Baker	2 Wall Street.
George S. Bowdoin	23 Wall Street.
Robert Goelet	9 West 17th Street.
George G. Haven	32 Nassau Street.
Adrian Iselin	36 Wall Street.
Augustus D. Juillard	66 Worth Street.
Luther Kountze	120 Broadway.
D. O. Mills	15 Broad Street.
J. Pierpont Morgan	23 Wall Street.
William K. Vanderbilt	Grand Central Station.
George Peabody Welmore	59 Pine Street.
William C. Whitney	2 West 57th Street.

IX. The post office addresses of the subscribers, and a statement of the number of shares of stock which each agrees to take in the corporation, are as follows (all of the said addresses being in the City of New York):

Names	Addresses	No. of shares
Samuel D. Babcock	32 Nassau Street	300
Elbridge T. Gerry	261 Broadway	300
George G. Haven	32 Nassau Street	300
Adrian Iselin	36 Wall Street	300
George S. Bowdoin	23 Wall Street	300

[fol. 11] X. The following provision for the regulation of the business and the conduct of the affairs of the corporation is also made, to wit: No transfer of stock shall be made except to a person or persons previously approved by the directors, and upon compliance with such terms as may, from time to time, be prescribed by the by-laws.

In witness whereof, we have made, signed and acknowledged this certificate this third day of March, in the year one thousand eight hundred and ninety-three.

S. D. Babcock, G. S. Bowdoin, G. G. Haven, Adrian Iselin, Elbridge T. Gerry.

State of New York,
City and County of New York, ss:

On this third day of March, 1893, before me personally came Samuel D. Babcock, Elbridge T. Gerry, George G. Haven, Adrian Iselin and George S. Bowdoin, personally known to be the same persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

Martin Eiche, Notary Public, #37, N. Y. Co.

Exhibit B to Amended Petition

Agreement dated the 3rd day of April, in the year one thousand nine hundred and eight, between the Metropolitan Opera and Real Estate Company, a corporation organized under the laws of the State [fol. 12] of New York, hereinafter designated as the lessor, and the Conried Metropolitan Opera Company, a corporation organized under the laws of the State of New York, hereinafter designated as the lessee.

Whereas, the said lessor, by an instrument in writing bearing date the 23rd day of March, 1903, did let unto the said lessee the premises known as the Metropolitan Opera House in the block bounded by Broadway, Seventh Avenue, Thirty-ninth and Fortieth Streets, in the Borough of Manhattan, City of New York, and also

the premises known as numbers 209 and 211 West 40th Street, in the said Borough and City, for the term of five (5) years from the first day of June, 1903; and

Whereas, the said lessor, by an instrument in writing bearing date in the month of August, 1905, did let unto the said lessee the premises known as the Broadway Apartment House, consisting of buildings on the northwest corner of Broadway and 39th Street, and on the southwest corner of Broadway and 40th Street, in the City of New York, with certain exceptions therein made and reserved, for the term of two and one-half (2½) years, to commence on the first day of November, 1905; and

Whereas, by agreement dated the 14th day of March in the year one thousand nine hundred and six, the rights of the respective parties under the above recited leases were surrendered and the premises hereinafter described were leased to the party of the second part upon the terms and conditions set forth in such agreement;

Now, this agreement witnesseth that, for and in consideration of the mutual covenants herein contained, and for and in consideration of the mutual surrender of the rights of the respective parties under the last above recited lease, and for and in consideration of the sum of one dollar, by each of the parties hereto to the other in hand paid, [fol. 13] the receipt whereof it hereby acknowledged, the parties to this agreement do for themselves and their successors, surrender, cancel and yield up, from and after the first day of June, 1908, the above described lease, and do hereby render and declare the same to be no longer binding and in effect, and the said lessee does for itself and its successors bargain, sell, surrender and yield up to the said lessor all the lands and premises therein mentioned and the term of years therein yet to come, with all of its rights, title and interest thereto, free and clear of all encumbrances and assignments of every kind whatsoever;

And this agreement further witnesseth that, for and in consideration of the covenants hereinafter contained, and the consideration hereinbefore referred to, the said lessor hath granted, demised and to farm let, and by these presents doth grant, demise and to farm let unto the said lessee, and the lessee has agreed to take from the said lessor, for a term of years to commence on the first day of June, 1908, and (except as otherwise hereinafter provided) to end on the 31st day of May, 1913;

All the premises situated in the Borough of Manhattan, City of New York, known as the Metropolitan Opera House in the block bounded by Broadway, Seventh Avenue, Thirty-ninth and Fortieth Streets, in said Borough and City, including the premises known as the Broadway Apartment House, consisting of buildings on the northwest corner of Broadway and Thirty-ninth Street and on the Southwest corner of Broadway and Fortieth Street in said Borough and City, with the cellar under and third and fourth stories over the Broadway entrance of the Metropolitan Opera House, and also all the premises known as numbers 209 and 211 West 40th Street in said Borough and City, now in use as a storage warehouse, as the said

buildings now exist—excepting and reserving therefrom however, so much of the said Broadway Apartment House situated at the corner [fol. 14] of Broadway and 39th Street, as is leased to and is now occupied by the New Amsterdam National Bank, together with all the rights, easements, privileges, and appurtenances thereunto belonging and pertaining, and also all scenery, costumes, music, machinery, fixtures, furniture, properties, carpets and apparatus of every kind and nature whatsoever belonging to the lessor which at the time of the commencement of this lease, or hereafter during the term of this lease, may be contained in or be appurtenant to or used in connection with the said Opera House and Warehouse; and also the office furniture, fittings, carpets, and other personal property therein belonging to the said lessor, together with the appurtenances.

It being understood that this lease does not cover the personal property contained in or pertaining to the restaurant and other furniture or boxes hereinafter specified belonging to the individual stockholders of the lessor, or the rooms, office and directors' box hereinafter reserved, or the peronal property therein. But this lease does include the ballroom, kitchen and other club rooms on the second floor at or near the corner of Broadway and 39th Street.

And the lessee in consideration of such letting, hereby covenants and agrees to pay unto the lessor the yearly rent or sum of Sixty-seven thousand dollars, payable in instalments, during the term of this lease, as follows:

On the 31st day of August in each year	$5,000
On the 30th day of September in each year	2,000
On the 31st day of October in each year	2,000
On the 30th day of November in each year	10,000
On the 31st day of December in each year	7,000
On the 31st day of January in each year	7,000
On the 28th day of February in each year	10,000
On the 31st day of March in each year	7,000
On the 30th day of April in each year	7,000
On the 31st day of May in each year	10,000
	$67,000

[fol. 15] Provided, however, that if the lessee shall fully perform all the conditions and agreements hereinafter contained in regard to the production of grand opera, and shall become entitled to certain payments as hereinafter provided, such payments shall be credited to it, without interest, as payments on account of the rent hereby reserved.

The above letting is on the following conditions all and every one of which the lessee covenants and agrees to keep and perform:

1. The lessee has represented to the lessor as an innducement to the making of this lease that it now has a capital of one hundred and fifty thousand dollars fully subscribed in cash, and the lessee covenants that during the term of this lease it will not voluntarily reduce the said capital.

2. The lessee shall pay the lessor or its agent the said specified rent at the times and in the manner above provided, or so much thereof as may be due after crediting the payments to which it may be entitled under the subsequent provisions of this agreement; and in case of the non-payment of the said rent, at the times or in the manner above provided, or in case the said leased premises shall be deserted or vacated, the lessor shall have the right to enter the same as the agent of the said lessee, either by force or otherwise, without being liable to any prosecution therefor, and to relet the said premises as the agent of the lessee and receive the rent therefor.

3. Neither the said Opera House premises nor any part thereof shall be assigned, let or underlet or used or permitted to be used for any purpose other than concerts, theatrical or operatic representations or balls without the consent of the lessor by its Executive Committee first had and obtained, nor for any such purpose if objected to by the [fol. 16] said Executive Committee under penalty of forfeiture and damages. Notice of all intended balls and representations other than grand opera, shall be given to the lessor in writing at least one week in advance. The said Broadway Apartment House is not to be used or occupied for any purpose except as an apartment house and a shop or restaurant, except that a portion thereof may be used by said lessee for the purpose of its opera business, provided such use be first approved of by the said lessor in writing; said lessee is not to permit the apartments to be occupied by any but private families and individuals of good repute, and will not permit any part of the premises to be occupied or used as a public bar-room or for any business deemed extra hazardous on account of fire or otherwise without the written consent of the said lessor under the like penalty; but nothing herein contained shall prevent the said lessee from selling wines and liquors or permitting the same to be sold in the restaurant conducted in said building in the same manner as heretofore. If the said premises or any part thereof be assigned, let or underlet, used or permitted to be used contrary to the provisions of this agreement, the lessor may re-enter and re-let the said premises, this lease by such unauthorized act becoming void, if the said lessor shall so determine and elect. The lessee further covenants that if any default be made in the payment of the rent or of any part thereof that may be due and unpaid at the times above specified, or, if any of the conditions of any part of this agreement are not fulfilled, or if default be made in the performance of any of the covenants or agreements contained in any part of this agreement, then and in such event this agreement shall, at the option of the lessor, become wholly void, and said hiring and the relation of landlord and tenant shall wholly cease and determine; and the lessor may re-enter the said premises and remove all persons therefrom.

[fol. 17] 4. The lessee covenants and agrees to pay all water rates and license fees, but not taxes and assessments, which may be imposed upon the said premises occupied by the lessee and herein demised, during the term of this lease, within thirty days after the

same are imposed; and in case of default the lessor may pay the said water rates or license fees, and the amount so paid, with interest at the rate of six per cent. per annum shall be added to and made a part of the rent then next falling due, and shall be collected at the same time and in the same manner as though it were rent then accruing.

5. The lessee will not do or permit anything to be done in the demised premises, or bring or keep anything therein which may in any way increase the rates of fire insurance on the said buildings or any of them, or conflict with the laws relating to fires, or with the regulations of the fire department, or with any insurance policy upon said buildings or any part thereof, or which may conflict with any of the laws or ordinances of the City of New York, or the Building Department, or the Board of Health or any of the Departments of the said City. And in particular the lessee covenants that no work shall be done upon the demised premises by scene painters, carpenters or other workmen for any person other than the lessee or persons to whom the premises may have been underlet, except in the storehouse Numbers 209 and 211 West 40th Street.

6. The lessee hereby covenants and agrees at the termination of this lease to quit and surrender the demised premises, together with all the scenery, costumes, music, machinery, fixtures, furniture, properties, carpets and apparatus of every kind belonging to the lessor, in as good state and condition as the same were when originally received by the lessee on or about June 1, 1903, ordinary and reasonable use thereof since that date excepted.

[fol. 18] 7. The lessee shall have the right to take and remove from the said Opera House during the existence of this lease any of the scenery, electrical fixtures and other apparatus, dresses, properties or music belonging to the lessor but only for the purpose of giving operatic representations in other States in the United States, or in Canada, Mexico or Cuba, and only upon the following conditions, viz.: that any such removal of scenery, electrical fixtures and other apparatus, dresses, properties or music shall be at the risk of the lessee who shall before removal give the lessor a detailed receipt for the articles so removed and shall be bound in any event to restore the same, and shall keep the same insured for the benefit of the lessor during the time they are away from the Opera House, in an amount and manner satisfactory to the lessor, and deliver the policies to the lessor. And in case the said lessee shall fail to insure the said property or fail to keep the same insured for the benefit of the lessor during the time that such property is away from the Opera House, then the said lessor may procure such insurance for its own benefit in such amounts and in such companies as it may desire, and the said lessee does hereby covenant and agree that such premium for fire insurance shall be deemed additional rent, and covenants and agrees to pay for such insurance upon the date that the next installment of rent is due, and in case of failure on the part of said lessee to pay the premium on such insurance at such time, then it shall be lawful for

the said lessor to collect the amount due for such premium of insurance together with six per cent. interest thereon from the date the same was paid by the lessor, in the same manner, and the said lessor may employ the same remedies, as is permitted to it to collect the rents herein reserved in case of default in the payment of such rents.

8. The lessor is not required to procure or furnish to or for the [fol. 19] use of the lessee any new dresses, scenery, properties, or other like material for new productions of opera or otherwise, and any such articles which the lessee needs shall be procured by it at its own expense; but nothing in this paragraph contained shall be construed to relieve the lessee from the necessity of complying with the terms of the two foregoing paragraphs. In case the lessee does procure new dresses, scenery, properties, electrical effects and other like material for the purpose of giving operatic or dramatic representations in the Opera House hereby demised, and not for the purpose of replacing articles belonging to the lessor, the same, as well as any others heretofore similarly procured by the lessee shall remain the property of the lessee and may be removed by it at or any time before the expiration of this lease.

9. If, during the term of this lease, the Opera House hereby demised is wholly destroyed by fire or the elements, then this lease shall, not only as to the Opera House but also as to the Apartment House and all the leased premises, cease and become null and void from the date of such destruction, and the lessee shall immediately surrender the said premises and all interest therein to the lessor, and shall only pay the proportionate rent for the period of actual occupancy prior to the time of such destruction or surrender. If, during the said term, the said Opera House is so damaged by fire or the elements as to render the same wholly unfit for the lessee's use and occupation, and is so badly injured that it cannot be repaired within sixty days from the happening of such injury, then this lease shall in like manner cease and become null and void from the date of such damage; provided, however, that if the damage can be repaired at a cost of not exceeding one hundred and fifty thousand dollars to the lessor, the lessee may, at its option, require the lessor to repair the same, as hereinafter provided, notwithstanding such repairs may occupy more than sixty days to execute. In case of destruction or [fol. 20] partial destruction to the extent above mentioned, the lessor may re-enter and repossess the premises discharged of this lease and may remove all parties therefrom. In case, however, the said Opera House shall be only so slightly injured as to be repairable within sixty days from the happening of such injury, or in case the injuries can be repaired at a cost not exceeding one hundred and fifty thousand dollars, and the lessee, by a notice in writing, served on the lessor within ten days after the happening of such injury and not less than one year before the date then fixed for the termination of this lease, shall require the lessor to repair the said Opera House, then and in either of said events this lease shall not terminate, but rent shall not run or accrue after said injury while the process of repair is going on between October first and April first in any contract year,

and the lessor shall repair the same with all reasonable speed, and then the rent shall recommence immediately after said repairs shall have been completed.

If during the term of this lease the said Apartment House shall be totally destroyed by fire or by the elements, leaving the Opera House undamaged or only partly damaged to the extent above mentioned, then this lease shall, as to the Apartment House only, cease and become null and void from the date of such destruction, and the lessee shall immediately surrender the said Apartment House and all interest therein to the lessor, and shall only pay the proportionate rent of the Apartment House for the period of actual occupancy prior to the time of such destruction or surrender. If during the said term, the said Apartment House is so damaged by fire or the elements as to render the same wholly unfit for the lessee's use and occupation and is so badly injured that it cannot be repaired within sixty days from the happening of such injury, then this lease shall in like manner cease and become null and void as to the Apartment House from the date of such destruction; provided, however, that [fol. 21] if the damage can be repaired at a cost not exceeding $50,000 to the lessor the lessee may, at its option, require the lessor to repair the same as hereinafter provided notwithstanding such repairs may require more than sixty days to execute. In case of destruction or partial destruction of the Apartment House to the extent above mentioned, the lessor may re-enter and re-possess the said Apartment House discharged of this lease, and may remove all parties therefrom. In case, however, the said Apartment House shall only be so slightly injured, as to be repairable within sixty days from the happening of such injury, or in case the injuries can be repaired at a cost not exceeding $50,000 and the lessee by a notice in writing served on the lessor within ten days after the happening of such injury, and not less than one year before the date then fixed for the termination of this lease, shall require the lessor to repair the said Apartment House, then, and in either of said events, this lease shall not terminate as to the Apartment House, but rent shall not run or accrue in respect of said Apartment House while the process of repair is going on, and the lessor shall repair the same with all reasonable speed, and then the rent shall recommence immediately after the said repairs shall have been completed; provided, however, that the lessor shall not be required to make such repairs to the Apartment House to an amount which, together with any repairs it may in consequence of the same disaster be required by the lessee to make to the Opera House, will cause the total cost of such repairs together to exceed $150,000. It is understood and agreed that for all purposes and in all the contingencies mentioned in this second paragraph of this article 9 of this lease the said Opera House and the said Apartment House shall be considered separate and distinct the one from the other, so that in case the said Apartment House shall be totally destroyed or partly destroyed to the extent aforesaid [fol. 22] by fire or by the elements, leaving the Opera House undamaged, or only partly damaged and repaired, this lease shall not cease or terminate as to the Opera House, but the rent of the Opera

House hereunder shall continue and shall be apportioned and shall be paid by the said lessee, and for such purposes the rent for the said Apartment House shall be considered to be Twelve thousand dollars ($12,000) per annum and for the said Opera House the sum of Fifty-five thousand dollars ($55,000) per annum.

If, however, the said Opera House and the said Apartment House, or either, shall not be rendered unfit for the lessee's use and occupation, the lessor shall be bound to repair the same with reasonable promptitude, and in that case the rent accrued and accruing shall not be suspended, nor shall this lease cease or determine.

10. If, during the term of this lease, the storehouse Numbers 209 and 211 West 40th Street is wholly dstroyed by fire or the elements, or is damaged so as to be wholly unfit for occupation—the Opera House not being destroyed or rendered wholly unfit for the lessee's us and occupation, and not being so badly injured that it cannot be repaired within sixty days, or the lessor having been required by the lessee to repair the same as hereinbefore provided—then and in either of such events this lease shall not cease as to the rest of the demised premises, but shall cease as to said storehouse; and the rent hereby reserved shall be reduced by the sum of Five thousand dollars ($5,000) a year, such reduction to begin from the date of such destruction or damage. But in case the said storehouse shall not be rendered unfit for occupation, the lessor shall be bound to repair the same with reasonable promptitude, and in such case the rent accrued and accruing shall not be suspended, nor shall this lease in any respect cease or be affected. If in the destruction or damage [fol. 23] of the storehouse as aforesaid, the scenery stored therein shall be destroyed or damaged so as to be unfit for use, then and thereafter the rental of the Opera House as well shall not run or accrue between October first and April first in any contract year until the lessee shall be able to replace the scenery destroyed or damaged to an extent sufficient to enable the lessee to continue to give representations of grand opera as contemplated by the terms of this lease. For the purposes of this article, rent of the Apartment House and of the Opera House shall be apportioned as provided in the foregoing article 9.

11. And the said lessee does hereby accept the said demised premises without any representations as to their condition whatever, and does hereby covenant and agree that the same are in perfect order and condition, and that it will not make any request for any expenditure on the part of the said lessor during the term of this lease for any repairs, additions, alterations or improvements whatsoever.

12. The lessee hereby undertakes and assumes the entire charge of the demised premises and shall at its own expense keep the whole of the same, including all of the rooms and offices and the boxes on both the parterre and grand tiers reserved by the lessor as hereinafter stated, and the porte-cocheres, sidewalk coverings, entrances, doors, railings and fire-escapes, together with the steam heat apparatus, water pipes, tanks, roof, skylights, etc., in the Opera House,

the Apartment House and the storage building above described in proper repair and suitably cleaned, heated and lighted, as hereinabove specified; it being understood and agreed that all repairs both exterior and interior are to be made by the lessee at the lessee's expense, and that the lessor shall at no time during the continuance of this lease be called upon to make any repairs to said premises whatsover and shall not be required to incur any expense whatsoever [fol. 24] in the maintenance, management or control of said buildings; and if any further connection is desired between the theater and the apartment buildings, the necessary construction is to be at the expense of the said lessee, the work, however, to be done in a manner to be approved by the lessor, and should such connection in any way increase the expense for fire insurance on the property, such increase is to be borne by the said lessee. The lessee is not, however, to make any substantial alteration in the premises hereby demised without the written consent of the lessor, under penalty of forfeiture and damages.

13. Notwithstanding the general terms used in this agreement in describing the Opera House included in this lease, it is distinctly understood and agreed that the lessor reserves for its own use the Directors' office at the Southeast corner of Fortieth Street and Seventh Avenue, the Directors' Box on the first or Grand Tier, the Directors' room and the ladies' room on the parterre tier, and also reserves free admission at all times to all parts of the demised premises for the Directors and four other persons in its employ. It is understood that the four persons here referred to are the employees of th lessor and are to be engaged and paid by it, and that they or such of them as the lessor may designate are to have entire charge of all the personal property, furniture, etc., belonging to the boxholders or stockholders of the lessor and are to care for the same.

14. It is further covenated and agreed by the lessee and is made a condition of this lease that the lessee shall and will give a season of not less than sixty (60) and not more than seventy (70) regular representations of Grand Opera at the said Metropolitan Opera House in each year of the term of this lease, such representations to be given in the last week of November and in the months of December, Jan- [fol. 25] uary, February or March; that is to say, not less than sixty (60) and not more than seventy (70) such representations are to be given in the period between November 24th, 1908, and March 31st, 1909; and not less than sixty (60) and not more than seventy (70) such representations are to be given in the corresponding period of each succeeding year; the word "year" being taken to mean the contract year beginning June 1 and ending the following 31st day of May. Such representations shall be in every respect first-class and shall be given with first-class artists, ensemble, chorus, ballet, scenery, properties and orchestra; and not more than forty per cent. of the subscription representations in each year shall be given in German, except with the approval of the lessor given by its Executive Committee.

15. The lessee shall and will reserve and set apart for the use of the lessor or such persons as it may designate at every representation of Grand Opera given during the term of this lease—whether the same be in excess of the seventy (70) regular representations a year above provided or not—all of the boxes situated on the parterre tier of the said Opera House, in addition to the box above mentioned on the first or grand tier; all other boxes and seats in the said house to remain at the disposal of the lessee. Six free admissions shall be allowed for each of the parterre boxes reserved as aforesaid. The box reserved on the first or the grand tier being intended for the use of the directors, on all occasions, whenever the house is open, and not only for or during representations of Grand Opera, but also for and during all concerts, balls and entertainments of every kind whatsoever for which said Opera House may at any time be used or occupied. The lessee is not required to give any special tickets of admission in respect thereto.

16. The regular operatic performances required to be given by the lessee under the foregoing clauses of this agreement shall be [fol. 26] given four times a week, on Monday, Wednesday and Friday evenings and Saturday matinees for not less than fifteen consecutive weeks in each season.

17. The lessee is at liberty to give, during any such period between November 24th and March 31st or at any other times, any number of extra representations of Grand Opera, in addition to the seventy (70) regular representations a year above provided for. In all cases of extra representations or performances the stockholders of the lessor shall have the same use of all the boxes hereinbefore reserved, with six free admissions for each parterre box, as in case of the regular performances.

18. The lessor hereby covenants and agrees to pay to the lessee as a subsidy, either by payment in cash or by a credit on account of the rent reserved in said lease, the sum of One thousand dollars ($1,000), for each of the regular performances of Grand Opera to be given as above provided; the word "subsidy" being understood and agreed to mean a payment to the lessee as a compensation for the boxes, Directors' office, Directors' rooms, and the ladies' room on the parterre, herein reserved to the lessor. No such subsidy shall be paid or credited in respect of any extra performances that may be given in addition to the four regular performances a week above provided for; but, up to a total amount of $70,000 in any contract year, the lessee shall be entitled to be paid, as aforesaid, the sum of $1,000 for each such regular performance. If and when the yearly rental hereby reserved has been fully paid for the entire year to the lessor either in cash or by credit as aforesaid, the said subsidy shall be paid to the lessee in cash at the end of each week of the operatic season.

19. Before the opening of each opera season, a list of the principal artists engaged shall be submitted to the lessor for its informa-

tion, and at all the regular operatic representations, not exceeding [fol. 27] seventy per year, at least two artists of recognized ability and not objected to by the lessor shall appear, except in case of illness or other unforeseen circumstances.

20. In case of any dispute or disagreement between the parties concerning any matter arising under this agreement the same shall be determined by arbitration as follows: The lessor shall nominate one person, and the lessee shall nominate one person, which nominations shall be made and signified in writing by each party to the other within ten days after notice by either party to the other of the demand to submit to arbitration any dispute. In default of such nomination by either party within the time above limited for making the same, the person who shall have been nominated by the other party shall appoint and associate with himself one other person for the purpose aforesaid. The two persons nominated or appointed as above shall then proceed as soon as possible to appoint a third person to be associated with them for the same purpose, if they can agree on such a person; if they cannot so agree, then each of them shall nominate two persons, and from the names of the four persons so nominated the name of one shall be drawn by lot, and he shall be associated for the purpose aforesaid with the two persons previously nominated or appointed. The three persons so elected shall then proceed to determine the dispute after making such inquiry or taking such proofs as they may deem necessary, and shall have the power to award damages against either party for any breach of this agreement. The decision of any two of the three arbitrators shall in all cases be binding and conclusive. Each person nominated or appointed as an arbitrator under this agreement shall, before entering upon his duties, be sworn before some person authorized to administer oaths to act therein faithfully and impartially, and the award or decision of any such arbitrators shall be made in writing and in duplicate and the one part thereof de- [fol. 28] livered to the lessor and the other to the lessee.

21. All notices to be given by either party to the other under this agreement, including nominations of arbitrators, must be given in writing and may be delivered either in person or by mail. Those given to the lessor shall be addressed to its president or treasurer at their respective places of business; those given to the lessee shall be addressed to it at the Metropolitan Opera House. Either party may from time to time by notice to the other give a new address, to which future notices shall be sent.

22. It is understood that Mr. Heinrich Conried will cease, on or before April 28, 1908, to be President and Managing Director of the lessee, and that its corporate name will be changed to "Metropolitan Opera Company," if that name be available.

The following are the present directors of the lessee: Edmund L. Baylies, Rawlins L. Cottenet, W. Bayard Cutting, T. De Witt Cuyler, Robert Goelet, George J. Gould, Eliot Gregory, Frank G. Gris-

wold, James H. Hyde, Otto H. Kahn, Clarence H. Mackay, Hamilton McK. Twombly, William K. Vanderbilt, Henry Rogers Winthrop, Harry Payne Whitney.

In case of the election of any other or additional directors, the names proposed shall first be submitted to the lessor, and no one shall be elected in place of or in addition to any of the foregoing, to whom, prior to his election, objection shall be made by the lessor.

In the event of the capital of the lessee becoming impaired to the extent of one hundred thousand dollars by reason of the losses in- [fol. 29] curred in any one year, either party hereto shall have the right to terminate this lease on the first of June following such impairment by giving prior thereto sixty days' notice in writing of its intention to terminate the same, unless the lessee shall, within said sixty days, make good such impairment. No failure to take advantage of this option shall operate as a waiver of the right to terminate this lease on any subsequent or continuing impairment of capital of the lessee.

23. The lessee hereby agrees during the term of this lease, to furnish the tenant of the premises now occupied by the New Amsterdam National Bank with all necessary steam heat at reasonable prices to be agreed upon by the parties hereto.

24. And the lessor hereby covenants with the lessee that on paying the said rent, and on keeping and performing all the said conditions and covenants contained herein, the said lessee shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term of this lease.

25. This agreement shall be binding upon the parties hereto and upon their respective successors and assigns; but it is distinctly understood and agreed that this agreement shall not, nor shall any interest therein, be assignable by the lessee to any person or persons whomsoever without the consent in writing of the lessor previously obtained, and that any assignment made without such consent shall be wholly void, so far as the rights and obligations of the lessor are concerned.

26. No waiver of any right of the lessor dependent upon a failure of the lessee to comply with or to perform any of the covenants or conditions of this lease shall be binding upon the lessor unless made in writing by an officer of the lessor, duly authorized thereto; and no waiver of such right or failure of the lessor to enforce any [fol. 30] of the covenants or conditions of this lease shall excuse or affect any subsequent default or omission or breach by the lessee or any of the lessor's rights to take advantage of such subsequent default, omission or breach.

27. The said lessee does also covenant and agree to comply with all of the ordinances, regulations and directions of the Board of Health, Fire and Police Departments, and other Municipal Departments of the City of New York, and does hereby covenant and agree

to make, at its own expense, any alterations, additions or improvements that may hereafter be required by any ordinances of the City of New York or by any rules or regulations of any of the Municipal Departments; provided, however, that, if the expense of any such alterations, additions and improvements shall exceed in any one contract year the aggregate sum of $5,000, then the amount of such expense in excess of $5,000 shall be paid in equal parts by the lessor and the lessee.

28. If said Opera House shall be destroyed by fire or the elements, or damaged so as to effect the termination of this lease, or if, after the termination of this lease, the said Opera House shall be sold, the lessee shall have the preferential right, at its option, to lease any new Opera House which may be built by or with the co-operation of the lessor, if the lessee shall, within a reasonable time after an opportunity shall have been afforded it to do so, express its willingness to lease the same upon terms as advantageous to the lessor as shall be offered by any other responsible corporation, person or firm.

29. If, at any time during the continuance of this lease, the lessee shall determine to sell and dispose of its stock, including costumes, scenery, stage requisites, equipment and machinery, and its unexpired contracts with artists, chorus, ballet, stage hands, archestra, [fol. 31] publishers and others, or to wind up its business, then the lessor shall have the preferential right, at its option, to purchase such stock and to assume such contracts, if the lessor shall, within thirty days after an opportunity shall have been afforded it to do so, offer to purchase and assume the same upon terms at least as advantageous to the lessee as shall be offered by any other responsible person, firm or corporation.

30. This lease shall be self-renewing, at the same annual rent, and upon all the terms, conditions and covenants hereof for terms of five years each, that is to say: If neither party shall notify the other on or before the thirty-first day of May, 1910, that it is unwilling to renew this lease, then ipso facto this lease shall be renewed as aforesaid and continued for a term of five years to commence on the first day of June, 1910, and to end on the thirty-first day of May, 1915; and if neither party shall notify the other on or before the thirty-first day of May, 1912, that it is unwilling to renew this lease, then ipso facto this lease shall be renewed as aforesaid and continued for a term of five years to commence on the first day of June, 1912, and to end on the thirty-first day of May, 1917; and thereafter unless and until either party shall notify the other, not less than three years prior to the expiration of the then present five years' term as so continued and renewed, that it is unwilling further to renew this lease, this lease shall, in like manner, be continued and renewed for further terms of five years each to commence in each instance three years prior to the expiration of such then present five years' term; but if either party shall so notify the other not less than three years before the expiration of

such then present five years' term that it is unwilling to renew this lease, then this lease shall terminate at the end of such then present five years' term. It is the intention that the omission to give such [fol. 32] notice on or before the dates respectively fixed as above provided shall in each instance be deemed and taken to be a renewal and extension of this lease as aforesaid, and that each such renewal shall be in all respects valid and binding upon the parties hereto without further act or writing, but the lessor covenants and agrees, upon the request of the lessee, to execute and deliver from time to time any and all renewal leases and other writings reasonably required by the lessee for the purpose of effectuating any and every such renewal to which the lessee shall be entitled as herein provided.

Provided, however, that if, after May 31, 1913, this lease continuing, the course of conduct of its affairs by the lessee shall, in the opinion of the lessor, be such as to give just and valid cause to believe that such conduct will be seriously detrimental to the moral and artistic interests of the Metropolitan Opera, and the lessor shall so notify the lessee, then the matter shall be submitted to arbitration in the manner hereinbefore provided, and if the decision of the arbitrators shall be that said course of conduct is in fact such as will be seriously detrimental to said moral and artistic interests, then this lease shall terminate at the end of the contract year next following the contract year in which such decision shall be delivered to the lessee. But if the arbitrators shall decide otherwise, and the lessor shall nevertheless insist upon the termination of this lease, then, at the lessee's option, the lessor shall assume all of the lessee's unexpired contracts with artists, chorus, ballet, stage hands, orchestra, publishers and others, and shall purchase, at their then appraised value, all of the lessee's stock, costumes, scenery, stage requisites, equipment and machinery, including all fixtures that shall have been placed by the lessee in or upon the said premises during the whole time it shall have occupied the same, allowing therefor the full valuation at which the same shall then be estimated in or in connection with the buildings and not for the pur- [fol. 33] pose of removal, such appraised value to be determined by arbitration in the manner hereinbefore provided; and this lease shall terminate at the end of the contract year next following the contract year in which such assumption and purchase shall be effected.

In witness whereof, the parties to this agreement have caused their respective corporate seals to be hereunto affixed, and these presents to be subscribed by their duly authorized officers as of the day and year first above written—in duplicate.

Metropolitan Opera and Real Estate Company, by Charles Lanier, Vice-President; George S. Bowdoin, Treasurer. (Corporate Seal.) Conried Metropolitan Opera Company, by H. R. Winthrop, Vice-President; R. L. Cottenet, Secretary. (Corporate Seal.)

STATE OF NEW YORK,
County of New York, ss:

On the 9th day of April, 1908, before me personally came Charles Lanier and George S. Bowdoin, with whom I am personally acquainted, who, being by me severally duly sworn, said, that they resided in The City & County of New York, N. Y.; that they are the Vice-President and Treasurer respectively of the Metropolitan Opera and Real Estate Company, the corporation described in and [fol. 34] which executed the foregoing instrument; that they knew the corporate seal of said corporation; that the seal affixed to above instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by the like order.

William G. Wilson, Notary Public, No. 178, New York County. (Notarial Seal.)

STATE OF NEW YORK,
County of New York, ss:

On the 20 day of April, 1908, before me personally came H. R. Winthrop, with whom I am personally acquainted, who, being by me duly sworn, said, that he resided in the City & County of New York; that he is the Vice-President of the Conried Metropolitan Opera Company, the corporation described in and which executed the foregoing instrument; that he know the corporate seal of said corporation; that the seal affixed to above instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by the like order.

John Brown, Notary Public, Kings County, #207. Certificate filed in New York Co. (Notary Seal.)

EXHIBIT C TO AMENDED PETITION

Agreement, made this seventh day of March, in the year one thousand eight hundred and ninety-three, by and between the Metropolitan Opera and Real Estate Company (hereinafter called "The Company"), party of the first part; and the several individuals whose names are hereunto subscribed, and who are stockholders in [fol. 35] the said Company (hereinafter called "The Stockholders"), parties of the second part; and the New York Guaranty and Indemnity Company (hereinafter called "The Trustee"), party of the third part, witnesseth as follows:

Whereas, the Company has been organized for the following purposes, among others, to wit: To encourage and cultivate a taste for music, literature and the arts and to erect, maintain, purchase or rent a building or buildings for that purpose; to give or cause to be given, operatic or dramatic representations; and to acquire and maintain an opera house with suitable equipment; and

Whereas, it has been proved by experience of opera houses in New York and other cities of the United States and Europe, that the ordinary receipts from performances of grand opera are insufficient to support and maintain the same in a satisfactory manner; and

Whereas, it is one of the purposes of the Company that each holder of a sufficient amount of stock therein shall have a license to use a designated box in the Opera House upon all occasions upon which grand opera may be given therein, without being called upon to pay the ordinary charge for admission; and

Whereas, the stockholders, in consideration of such license, are willing to contribute ratably such limited amounts of money as may, from time to time, be deemed necessary by the directors to provide for giving grand opera, or other operatic or dramatic representations, and to support and maintain the opera house of the Company in a satisfactory manner; and

Whereas, it is deemed desirable to provide a mode for securing [fol. 36] prompt payment of the assessments which may be made for the purposes above mentioned by the Directors and to limit the liability of stockholders and to provide, by the deposit of collateral security, for the payment by the present and future stockholders of the sums they may be called upon to pay.

Now, therefore, in consideration of the premises and of the mutual agreements hereinafter contained, and of the sum of one dollar by each of the subscribers hereto, to each of the others in hand paid, the receipt whereof is hereby acknowledged, it is agreed by and between the undersigned individuals and corporations, each for himself or itself, and not for the others, or any of them, as follows, to wit:

First. The stockholders, each for himself and his or her representatives, executors, administrators and assigns, severally agree with each other, and with the Company, that they will, from time to time, contribute to and for the use of the said Company, such amounts of money (not exceeding ten dollars for each share of stock in any one year) as the Directors of the said Company may in their discretion see fit to call for. It is expressly understood and agreed that payment of all such contributions can be enforced only by the sale of stock pledged to the Trustee, as hereinafter provided, and not otherwise.

Second. Whenever, and as often as the Board of Directors of the Company shall determine that an assessment upon the stockholders, under the provisions of this agreement, is to be made, they shall cause notices in writing to be issued to each stockholder whose name appears upon the books of the Company, requiring each such stockholder to pay the amount stated in such notice on or before a day to be specified therein, which shall not be less than thirty days from the mailing of such notice.

[fol. 37] Third. In order to secure payment of the amounts which the stockholders hereby agree to pay, they do hereby pledge the amount of stock in the Company held by them respectively, and to that end will deposit their several certificates, duly endorsed, with

the above named Trustee, to be held for the purposes and upon the terms and conditions specified below.

Fourth. In case any one or more of the stockholders shall fail to pay the sum assessed, as provided in clause second of this agreement, on or before the day fixed in the notice mentioned therein, the said Trustee shall forthwith mail notice to such delinquent stockholder or stockholders, notifying him or them that unless the amount assessed, with six per cent. interest, be paid on or before a day specified in such notice, which shall not be less than ninety days from the mailing thereof, their respective shares of stock will be sold.

Fifth. In case the amount of any assessment, with the interest thereon, be not paid by the day specified in the notice mentioned in clause fourth, the Trustee shall sell all stock deposited with it by the person so failing to pay, which sale shall be made at public auction in the City of New York; notice of the time and place of sale shall be mailed to the person so failing to pay, at least ten days before the sale, and shall also be published at least twice in each week for two successive weeks before the sale in two daily newspapers published in the City of New York. The Trustees shall apply the net proceeds of any such sale (after payment of all expenses of sale, including the Trustee's compensation therefor) to the payment of all unpaid assessments thertofore levied upon the stock so sold, with the interest thereon, and it shall render the surplus (if any) arising upon such sale to the holder of such stock, his executors, administrators or assigns. All purchasers from such Trustee shall be required to be-
[fol. 38] come parties to this agreement, and in all other respects to conform to the provisions of the by-laws respecting transfers of stock.

Sixth. The notices required by clauses second, fourth and fifth of this agreement shall be served by mailing such notices to the respective stockholders at the addresses stated below, or at such other addresses as may be substituted, as hereinafter provided; and such notices shall be deemed to have been served at the time they are deposited in the mail. Any stockholder may, from time to time, substitute a new address by giving notice, in writing, to the Secretary of the Company, and may, in like manner, require notices to be mailed to an agent whose address is given.

Seventh. It is understood and agreed that there shall not, under any circumstances whatever, be any liability on the part of any stockholder for any deficiency arising upon any such sale, nor shall any suit or action at law be maintained against any of the stockholders or their executors, administrators or assigns, for the recovery of any sum or sums of money which may be claimed to be due under or by virtue of this agreement; it being the true intent and meaning of this agreement to limit the liability of each stockholder for calls or assessments by the directors to the value of the stock held by each respectively.

Eighth. The said Trustee shall, from time to time, issue receipts specifying the amount of stock pledged with it by each stockholder respectively, and the number of the box or boxes to which such stockholder is entitled by virtue of holding the same, which receipts shall not be transferable, and shall contain upon their face a reference to this agreement. Upon the surrender of any such receipt, the Trustee shall deliver the corresponding certificate of stock to the Secretary of the Company for purposes of transfer only and the [fol. 39] stockholders hereby severally agree, for themselves and their respective executors, administrators and assigns, that every person to whom any share of stock is transferred shall and will, immediately upon such transfer being made, sign this agreement or such other instrument as may be necessary to make him a party hereto, and that he shall be bound by all the terms hereof, and that such transferee shall immediately, upon the issue of a new certificate of stock, duly endorse his certificate and deliver the same, so endorsed, to the Trustee to be held under the terms of this agreement, and shall accept a new receipt to be issued by the Trustee.

Ninth. This agreement may be abrogated and rescinded at any time by a new agreement, in writing, executed by the Company and the holders of two-thirds of the stock then outstanding; and, upon the execution of such agreement and its delivery to the Trustee, the Trustee shall return to each stockholder the certificates of stock standing in his or her name, upon surrender of the corresponding receipts.

Tenth. The Trustee has become a party to this instrument in order to signify its acceptance of the trust hereby created; but it is expressly understood and agreed that no responsibility shall attach to the Trustee for its acts hereunder, or in respect of any matter or thing, omission or commission, except its own wilful default; nor shall it be answerable for any default or miscarriage of any agent or attorney appointed hereunder, if such agent or attorney be selected with reasonable care.

In witness whereof, the said Metropolitan Opera and Real Estate Company, and the said New York Guaranty and Indemnity Company, have caused this agreement to be executed by their respective [fol. 40] officers, and their corporate seals to be hereunto affixed; and the stockholders of the said Metropolitan Opera and Real Estate Company have severally subscribed their names hereto on the day and year first above written.

The Metropolitan Opera and Real Estate Company, by G. G. Haven, President; G. S. Bowdoin, Treasurer. (Corporate Seal.) New York Guaranty & Indemnity Company, by Edwin Packard, President; H. A. Murray, Secretary. (Corporate Seal.)

Exhibit D to Amended Petition

Agreement made this fifteenth day of February, 1916, by and between the Metropolitan Opera and Real Estate Company (hereinafter called "The Company"), party of the first part, and the several individuals whose names are hereunto subscribed and who are stockholders in the said Company (hereinafter called "The Stockholders"), parties of the second part; and the Guaranty Trust Company of New York, formerly the New York Guaranty and Indemnity Company, (hereinafter called "The Trustee"), party of the third part, Witnesseth as follows:

[fol. 41] Whereas, the contribution or assessment of Ten Dollars for each share of stock of The Company which has heretofore been paid under Section First of the agreement dated March 7, 1893, made between The Company, as party of the first part, all of the stockholders of The Company, as parties of the second part, and the New York Guaranty and Indemnity Company, as party of the third part, is inadequate to meet the financial requirements of The Company now existing and that will hereafter exist, and if sufficient funds are not provided by The Stockholders, it will or may interfere with, injuriously affect or defeat the purposes for which The Company was organized as set forth in said agreement of March 7, 1893, and impair or destroy the value of the licenses conferred upon The Stockholders by virtue of the said agreement; and

Whereas, it is deemed desirable to avoid the consequences above referred to, to assure which it is considered essential that provision should be made for the procurement of the requisite funds now and hereafter in the manner hereinbefore set forth.

Now, therefore, in consideration of the premises and of the mutual agreements hereinafter contained, and of the sum of One dollar ($1.00) by each of the subscribers hereto to each of the others in hand paid, the receipt whereof is hereby acknowledged it is agreed by and between the undersigned individuals and corporations, each for himself and not for the others, or any of them, as follows:

First. Such of The Stockholders of The Company as shall sign this agreement, each for himself and his or her representatives, executors, administrators and assigns, severally agree with each other, and with The Company, that they will, from time to time, contribute to and for the use of The Company such amounts of money [fol. 42] in addition to the assessments provided for in said agreement of March 7, 1893 (not exceeding however the additional sum of Five dollars for each share of stock in any one year), as the directors of The Company may in their discretion see fit to call for. It is expressly understood and agreed that payment of all such contributions can be enforced only by the sale of stock pledged to The Trustee, in the manner provided in the said agreement of March 7, 1893, and not otherwise.

Second. In order to secure the payment of the amounts which The stockholders hereby agree to pay, they do hereby pledge the amount of stock in the Company held by them respectively, the certificates of which are now on deposit with The Trustee pursuant to the terms of said agreement of March 7, 1893; and they do further agree that all of the provisions of the said agreement of March 7, 1893, shall apply to the said additional contribution or assessment of Five dollars per share of stock, and of the pledge of stock to secure the payment thereof, with like force and effect as the same apply to the contribution or assessment of Ten dollars per share of stock, and of the pledge of stock to secure the payment thereof, as provided for by said agreement; and all of the other provisions of said agreement are hereby adopted and made a part of this agreement with the same force and effect as if the same were written herein at large and signed by the subscribers hereto.

Third. This agreement is not in abrogation, or rescicsion, of, or in substitution for, the said agreement of March 7, 1893, but is an additional and separate agreement between the parties hereto.

Fourth. This agreement may be executed in counterparts, each of which shall be an original and all of which shall together constitute one and the same agreement.

[fol. 43] In witness whereof the said Metropolitan Opera and Real Estate Company and the said Guaranty Trust Company of New York have caused this agreement to be executed by their respective officers and their corporate seals to be hereunto affixed; and Stockholders of the said Metropolitan Opera and Real Estate Company have severally subscribed their names hereto on the day and year first above written.

Metropolitan Opera and Real Estate Company, by A. D. Juilliard, President, and G. G. Haven, Treasurer. (Corporate Seal.) Guaranty Trust Company of New York, by Wm. C. Cox, Vice-President. (Corporate Seal.)

Attest: C. E. Hebbard, Secretary.

[fol. 44] III. General Traverse—Filed April 23, 1923

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Robert H. Lovett, Assistant Attorney General.

IV. Argument and Submission of Case

On April 8, 1924, this case was argued and submitted on merits by Mr. Chas. P. Howland, for the plaintiff, and by Messrs. Fred K. Dyar and Charles T. Hendler, for the defendant.

[fol. 45] **V. Findings of Fact, Conclusion of Law, and Opinion of the Court by Hay, J.**—Entered May 5, 1924

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

At all times material to this action the plaintiff, Georgine Iselin, was and now is the owner of three hundred shares of the capital stock of Metropolitan Opera and Real Estate Company (hereinafter referred to as the Metropolitan Company), a corporation organized under the laws of the State of New York and having its principal office at No. 150 West Fortieth Street, city of New York, N. Y.

II

The objects of the Metropolitan Company are stated in its certificate of incorporation, which is attached to the petition of the plaintiff marked "Exhibit A," and made a part hereof by reference. At all times material to this action the Metropolitan Opera Company owned and now owns the premises known as the Metropolitan Opera House in the block bounded by Broadway, Seventh Avenue, Thirty-Ninth and Fortieth Streets, in the Borough of Manhattan, city of New York.

III

In and by a certain lease and agreement dated April 3, 1908, which is still in full force and effect, the Metropolitan Company leased the said Opera House and other property to the Conried Metropolitan Opera Company, the name of which was later changed to Metropolitan Opera Company (hereinafter referred to as the Opera Company), a corporation organized under the laws of the State of New York. Under the terms of said lease and agreement, and in consideration of the letting of the property referred to therein, the Opera Company covenanted and agreed to reserve for the use of the [fol. 46] Metropolitan Company or such persons as it might designate at every representation of grand opera given during the term of said lease all of the boxes situated on the Parterre tier of the said Opera House; that "six free admissions shall be allowed for each of the parterre boxes reserved as aforesaid"; to pay the Metropolitan Company a yearly rent or sum of $67,000; and to give a season of not less than sixty and not more than seventy regular representations of grand opera at the said Opera House in each year of the term of said lease. Under the terms of said lease and agreement the Metropolitan Company covenanted and agreed to pay to the Opera Company as a subsidy the sum of $1,000 for each of the regular per-

formances of grand opera to be given as provided therein. During all the times material to this action such subsidy amounted to $70,000 for each season, which was duly paid. The lease and agreement above referred to is attached to the petition of the claimant marked "Exhibit B," and is made a part hereof by reference.

IV

At all times material to this action the by-laws of the Metropolitan Company have contained and now contain the following provision:

"Article VII

"Section 4. Each holder or holders of 300 shares of stock shall have a license to use a designated box upon the parterre tier of the opera house. The license to use a box, above referred to, shall entitle the stockholder or stockholders, to whom such box is allotted, to occupy the box at all representations of grand opera, subject to such assessments and under such general rules and regulations as the board of directors may, from time to time, determine. No stockholder who is indebted to the company shall be allowed to use his box until such indebtedness is fully paid."

V

The stockholders of the Metropolitan Company entered into a further agreement, dated February 15, 1916, with the Metropolitan Company and with the Guaranty Trust Company of New York (Successor to the New York Guaranty and Indemnity Company), as trustee, providing among other things:

"First. Such of the stockholders of the company [i. e., the Metropolitan Company] as shall sign this agreement, each for himself and his or her representatives, executors, administrators, and assigns, severally agree with each other and with the company, that they will, from time to time, contribute to and for the use of the company such amounts of money in addition to the assessments provided for in said agrement of March 7, 1893 (not exceeding however the additional sum of five dollars for each share of stock in any one year), as the directors of the company may in their discretion see fit to call for."

Said agreement is attached to the petition of the claimant as "Exhibit C," and made a part hereof by reference.

[fol. 47] VI

The stockholders of the Metropolitan Company entered into an agreement, dated March 7, 1893, with the Metropolitan Company and with the New York Guaranty and Indemnity Company, as trustee. Said agreement provides among other things:

First. The stockholders, each for himself and his or her representatives, executors, administrators, and assigns, severally agree with each other, and with the company [i. e. the Metropolitan Company], that they will, from time to time, contribute to and for the use of the said company such amounts of money (not exceeding $10 for each share of stock in any one year) as the directors of the said company may in their discretion see fit to call for."

Said agreement is attached to the petition of the claimant as "Exhibit D," and is made a part hereof by reference.

VII

On or about March 28, 1905, the plaintiff became the owner and holder of 300 shares of the capital stock of the Metropolitan Company, and thereby acquired a license to use the box numbered 15 upon the parterre tier of the said opera house. At all times thereafter the plaintiff continued to own and now owns said shares of stock and the license to use said box.

VIII

Pursuant to the provisions of the by-laws set forth in proposition 5 above, and to the rules and regulations of the board of directors of the Metropolitan Company, the plaintiff duly signed and became a party to each of said agreements, Exhibit C and Exhibit D. In each and every year during which the plaintiff has held said stock in the Metropolitan Company she has duly paid the annual assessment called for by the directors of the Metropolitan Company and has been allowed to use said box; in November, 1919, the directors called for an assessment of $3,000, which she duly paid. The Metropolitan Company has never realized any annual profit, and has never distributed any profits to its stockholders.

IX

In consideration of the sum of $9,525 the plaintiff transferred the license to use said box for 47 performances during the grand opera season extending from November, 1919, to April, 1920, both inclusive, for a consideration computed as follows:

1 Opening night performance	$550
11 Monday night performances, at $275 each	3,025
11 Monday night performances, at $200 each	2,200
23 Friday night performances, at $150 each	3,450
1 "Prince of Wales" performance, November 18, 1919	,300
47	9,525

[fol. 48]

X

Prior to the opening of said opera season six tickets of admission to the parterre box of the plaintiff were issued to her for each per-

formance during the opera season. The plaintiff employed an agent to sell and dispose of the said tickets for her; said agent sold said tickets, which gave the purchasers thereof the right to use said box for the performance for which the tickets were sold. The said agent submitted to the plaintiff the names of the persons to whom the tickets were sold, and she transferred to such persons the license to use said box in consideration of the amount for which she, through her agent, sold said tickets. The plaintiff paid to said agent a commission for his services.

XI

On or about December 30, 1919, the plaintiff without protest, made a return and paid tax thereon under the provisions of section 800(a), paragraph (5), of the revenue act of 1918, said return being based upon an admission price of $60 per performance.

XII

On or about August 4, 1919, the attorneys for the Metropolitan Company asked the Commissioner of Internal Revenue for a ruling with respect to the application of section 800(a) of the revenue act of 1918 to transactions such as are set forth above. Under date of December 24, 1919, the Commissioner of Internal Revenue ruled as follows (p. 59):

"And stockholder of the Metropolitan Opera and Real Estate Company selling a ticket for admission to any of the boxes in question, whether direct or through the opera house box office, is subject to the tax imposed by paragraph (3) of this section of the statute and must mark such ticket in accordance with article 51 of the enclosed regulations. The basis for computing this tax is the difference between the established price of the box seat in the second tier for that performance, as determined by article 17 of the enclosed regulations, and the price for which the ticket is sold."

The established price at which the boxes situated in the second tier, which is the tier above the parterre boxes in the said Opera House and known as the grand tier boxes, were sold for the performances at the box office to the general public was $60 for each performance.

XIII

The boxes described as the grand tier boxes, the price of which is fixed at the box office of the opera house at $60 per performance and which seat six persons, are uniform in size with the boxes of the stockholders known as the parterre boxes, which also seat six persons and are substantially similar thereto.

XIV

In compliance with said ruling the plaintiff on or about January 28, 1920, made a return to the collector of internal revenue for the

[fol. 49] second district of New York, setting forth said transactions, and the plaintiff paid to said collector of internal revenue the sum of $3,352.50, being a tax equivalent to 50 per centum of the excess of said sum of $9,525 over an amount equal to $60 for each of said 47 performances, said return being filed and said payment being made under protest and because of duress and in order to avoid the imposition of penalties. Thereafter, on October 23, 1920, the plaintiff presented to the Commissioner of Internal Revenue a claim for the refunding of said tax and alleged the same to have been erroneously or illegally collected. Said claim for refund was duly filed with the Commissioner of Internal Revenue according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof. On or about May 27, 1921, the Commissioner of Internal Revenue rendered a decision on said claim and rejected the same, ruling that said alleged tax was payable under the provisions of paragraph (4) of Section 800 (a) of the revenue act of 1918.

Conclusion of Law

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is not entitled to recover, and that her petition must be and the same is hereby dismissed. Judgment is rendered against the claimant for the cost of printing the record in this cause, the amount thereof to be fixed by the clerk and to be by him collected according to law.

Opinion

Hay, Judge, delivered the opinion of the Court:

The plaintiff is the owner and holder of 300 shares of the capital stock of the Metropolitan Company, and thereby is entitled to a license to use box No. 15 upon the parterre tier of the Metropolitan Opera House.

On December 30, 1919, the plaintiff without protest made a return and paid tax thereon under the provisions of section 800 (a), paragraph (5) of the revenue act of 1918, said return being based upon an admission price of $60 per performance during the opera season extending from November, 1919, to April, 1920, both inclusive.

On December 24, 1919, the Commissioner of Internal Revenue made a ruling that any stockholder of the Metropolitan Company selling a ticket for admission to any of the boxes held by the stockholders of said company, whether the sale of tickets was direct or through the opera house box office, was subject to the tax imposed by paragraph (3) of section 800 (a) of the revenue act of 1918.

In compliance with that ruling the plaintiff on January 28, 1920, made a return to the collector of internal revenue for the second district of New York, setting forth that she had, in consideration of the sum of $9,525 sold tickets to her box in the said opera house for 47 performances during the grand opera season from November, 1919, to April, 1920, both inclusive; and the plaintiff paid to the said col-

lector the sum of $3,352.50, being a tax equivalent to 50 per centum of the excess of said sum of $9,525 over an amount equal to $60 for each of said 47 performances, said return being filed and said [fol. 50] payment being made under protest. Thereafter, on October 23, 1920, the plaintiff presented to the Commissioner of Internal Revenue a claim for the refunding of said tax and alleged that the same was erroneously or illegally collected. On May 27, 1921, the Commissioner of Internal Revenue rendered a decision on said claim and rejected the same. Whereupon the plaintiff brought this suit to recover from the United States the said sum of $3,352.50.

The decision of this case depends upon the construction which is to be placed upon paragraph (3) of section 800 (a) of the revenue act of 1918, taken in connection with paragraph (5) of the same section and act.

Paragraph (5) reads as follows:

"In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement (in lieu of the tax imposed by paragraph (1)), a tax equivalent to 10 per centum of the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder, such tax to be paid by the lessee or holder."

Under this paragraph the plaintiff made a return and paid the tax. In making said return she fixed the price of the box which she holds at $60, which was equivalent to $10 for each ticket sold for said box, it appearing that six tickets for said box for each performance are issued to the holder of the box, prior to the opening of the opera season. The plaintiff in this case employed an agent to sell and dispose of the said tickets for her. The agent sold the tickets, and after deducting his commission for his services turned over the proceeds of said sales to the plaintiff. The taxes were paid by the plaintiff without protest, and she does not now make any claim for the refund of the taxes paid by her under paragraph (5).

Paragraph (3) of section (800) (a) of the revenue act of 1918 reads as follows:

(3) Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 50 cents in excess of the sum of the established price therefor at such ticket offices plus the amount of any tax imposed under paragraph (1), a tax equivalent to 5 per cent of the amount of such excess; and if sold for more than 50 cents in excess of the sum of such established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per cent of the whole amount of such excess, such taxes to be returned and paid, in the manner provided in section 903, by the person selling such tickets.

It will be observed that under this paragraph the tax is imposed on the persons selling the tickets.

The tax is imposed upon persons who sell tickets at news stands, hotels, and places other than the ticket offices of theaters, operas, or other places of amusement. From the wording of the statute, then, it makes no differences where the tickets are sold by the person selling them. It is enough if they are sold, and it can not be said that in order to be subject to the tax the person selling them must sell them at news stands, hotels, and places of like character. [fol. 51] If that were so the intent and purposes of the act would be defeated and the payment of the tax could very easily be evaded.

Manifestly it was the intent and purpose of Congress that if tickets were sold for more than 50 cents in excess of the established price, plus the amount of the tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess should be imposed. Such tax was not confined to tickets sold at news stands, hotels, and similar places, but was to apply to all sales of tickets and to all persons selling them wherever sold. The plaintiff is not exempt from the tax imposed by paragraph (3) unless she can demonstrate that the tickets sold by her are not included in the provisions of that paragraph.

The plaintiff in order to do this contends that having paid the tax imposed by paragraph (5) she is exempt from paying the tax imposed by paragraph (3), no matter at what price she may have sold the tickets for her box.

When Congress enacted paragraph (5) of the statute the evident purpose was to reach by a larger tax persons who were able to have the permanent use of boxes in an opera house, or who had a lease for such boxes. It was not assumed that such persons would sell tickets for these boxes, or if it was, Congress might well have considered that paragraph (3) would apply as well to such persons as to other sellers of tickets. There is nothing in paragraph (5) which of itself exempts the holders of boxes from the provisions of paragraph (3).

The plaintiff lays much stress upon the alleged fact that there was no established price for the tickets sold by her, and argues that if there was no established price for said tickets she does not come under the provisions of paragraph (3); that an established price for said tickets must be shown to exist, or to be in effect at the time of the sale, before the tax can be imposed.

The Government in ascertaining the tax for which the plaintiff was liable under paragraph (5) fixed the price of the box of the plaintiff at $60 or $10 for each ticket. She paid this tax without protest and thereby acquiesced in and agreed that $60 was the price of the box for purposes of taxation under paragraph (5). If, then, $60 was the price which was recognized both by the plaintiff and the Government as being the price established for purposes of taxation under paragraph (5) it necessarily became the established price upon which to base the tax imposed by paragraph (3) if plaintiff was liable for said last-named tax, as any person would be who sold

tickets for more than 50 cents in excess of the sum of the established price.

It seems to be the contention of the plaintiff that a price must be established by some person having the power of establishment. Who other than the plaintiff had the power to establish the price of a box, or seats in a box, over which she had absolute control? And so when it came to establishing a price for her box for purposes of taxation she acquiesced in the price.

It is true that she sold her box for the 47 performances for a price which was far in excess of the $60. But because she established one price at one time and another price at another time, can she thereby be relieved of taxation by alleging that there was no established price as required by the statute? If so, then the statute is nugatory, not only as to the plaintiff but as to all others who [fol. 52] might have it in their power to establish prices for tickets at first one price and then another.

The statute must be construed in the light of reason and common sense, and it is not perceived why the plaintiff should be exempted from the tax imposed by paragraph (3). She sold the tickets and obtained for them more than 50 cents in excess of the sum of the established price. The intent and purpose of Congress was to impose a tax in just such a case, and the fact that the plaintiff paid another and a different tax upon a box which she owned can not excuse her from paying the tax. Nor does it seem a great hardship even if the $3,000 assessment paid by her is taken into consideration, for after paying the assessment on her shares of stock and the tax she has still something over $3,000 as the result of her ticket sales.

These being the views of the majority of the court the petition of the plaintiff must be dismissed. It is so ordered.

[fol. 53] VI. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the fifth day of May, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Thirty-four dollars and seventy-six cents ($34.76), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VII. Plaintiff's Application for Appeal—Filed June 20, 1924

From the judgment rendered in the above-entitled cause on the 5th day of May, 1924, in favor of the defendant, claimant, by her attorneys, on the 20th day of June, 1924, makes application for and gives notice of an appeal to the Supreme Court of the United States.

Rushmore, Bisbee & Stern, by Charles P. Howland, Attorneys for Claimant.

VIII. Order of Court Allowing Plaintiff's Application for Appeal

On this 23d day of June, 1924, it is ordered by the Court that the plaintiff's application for appeal be and the same is allowed.

[fol. 54] Court of Claims of the United States

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the Court by Hay, J.; of the judgment of the Court; of the plaintiff's application for an appeal and of the order of the Court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this twenty-fifth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 30,460. Court of Claims. Term No. 495. Georgine Iselin, appellant, vs. The United States. Filed July 1st, 1924. File No. 30,460.

Office Supreme Court
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WM. R. STANS

(File No. 30,460.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 119.

GEORGINE ISELIN, *Appellant,*

against

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS OF THE UNITED STATES.

BRIEF FOR APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925, No. 119.

GEORGINE ISELIN,
Appellant,

against

THE UNITED STATES,
Appellee.

Appeal from the Court of Claims.

BRIEF FOR THE APPELLANT.

Opinion of Court Below.

The opinion of the court below appears in 59 Court of Claims Reports, 654.

It is also printed in the Record herein at pp. 31-34.

Jurisdictional Grounds.

This is an appeal from a judgment of the Court of Claims dismissing the appellant's petition for the refund of a tax paid under Section 800 (a), Paragraph (3) of the Revenue Act of 1918 (40 Stat. L. 1120). The judgment was entered May 5, 1924 (R., 24).

The question presented is whether or not the proceeds of transfers of a stockholder's license to occupy a box in the Metropolitan Opera House in the City of New York are taxable under Paragraph (3) of the Act.

The specific claims advanced, and relied upon as the basis of this court's jurisdiction, are:

> That the findings of fact of the Court of Claims do not sustain the judgment;
>
> That the Court of Claims erred in construing Section 800 (a), Revenue Act of 1918;
>
> That the Court of Claims erred in adjudging that the appellant was not entitled to recover any sum, by way of refund of the tax paid, against the United States, and in dismissing her petition; the said claim aggregating more than $3000.

The jurisdiction of this Court is invoked under Sec. 242, Judicial Code (36 Stat. L. 1157).

An appeal lies to this court from final judgments of the Court of Claims on behalf of the plaintiff where the requisite amount is involved. *In re Sanborn,* 148 U. S. 222, 225.

This appeal was taken prior to the revision of the Judicial Code by Act February 13, 1925.

The Statute.

The statute in question is as follows:

"Revenue Act of 1918, Title VIII—Admissions.

"Sec. 800 (a). That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 700 of the Revenue Act of 1917—

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission;

"(2) In case of persons (except bona fide employees, municipal officers on official business, persons in the military or naval forces of the United States when in uniform, and children under twelve years of age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, a tax of 1 cent for each 10 cents or fraction thereof of the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted;

"(3) Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at newsstands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 50 cents in excess of the sum of the *established price therefor at such ticket offices* plus the amount of any tax imposed under paragraph (1), a tax equivalent to 5 per centum of the amount of such excess; and if sold for more than 50 cents in excess of the sum of such

established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess, such taxes to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

"(4) A tax equivalent to 50 per centum of the amount for which the proprietors, managers, or employees of any opera house, theater, or other place of amusement, sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor, such tax to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

"(5) In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement (in lieu of the tax imposed by paragraph (1)), a tax equivalent to 10 per centum of *the amount for which a similar box or seat is sold* for each performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder, such tax to be paid by the lessee or holder; and

"(6) A tax of 1½ cents per each 10 cents or fraction thereof of the amount paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service, or merchandise; the amount paid for such admission to be deemed to be 20 per centum of the amount paid for refreshment, service, and merchandise; such tax to be paid by the person paying for such refreshment, service, or merchandise."

Statement of the Case.

The Metropolitan Opera & Real Estate Company (hereinafter referred to as the Metropolitan Company) was organized as a result of the association of certain individuals for the avowed purpose of encouraging and cultivating "a taste for music, literature and the arts" and "to give, or cause to be given, operatic or dramatic representations, concerts, balls, and other entertainments" (Record, p. 27; Findings, par. II; Record, p. 6).

To effectuate this purpose capital stock in the sum of $1,050,000, consisting of 10,500 shares of common stock, was provided, and the Company acquired the Metropolitan Opera House and other real and personal property necessary and incident to the carrying out of its expressed purposes (Record, p. 27; Findings, par. II; Record, p. 6).

The property was leased to the Metropolitan Opera Company (hereinafter referred to as the Opera Company). Under the terms of the lease the Opera Company agreed to pay an annual rental of $67,000 and to give a minimum of 60 and a maximum of 70 operatic performances in each season. The Metropolitan Company agreed to pay a subsidy of $1000 for each of such regular performances. During the operatic season in question such subsidy amounted to $70,000 and was paid (Record, p. 27; Findings, par. III).

The Metropolitan Company has never realized any annual profit, and has never distributed any profits to its stockholders (Record, p. 29; Findings, par. VIII).

To provide an additional fund to cover the financial obligations incident to the execution of the purposes of its organization, the ordinary receipts from performances of

grand opera being insufficient to support and maintain the same, stockholders obligated themselves by two agreements with the Metropolitan Company, the Guaranty Trust Company of New York, and with each other to pay assessments upon their stock up to an aggregate of $15 per share annually (Record, pp. 28-9; Findings, pars. V and VI, incorporating as a part of such findings the agreements in question, at Record, pp. 21-6, inc.).

The Opera Company further agreed in said lease to reserve at every representation of grand opera given, for the Metropolitan Company or such persons as it might designate all of the 35 boxes situated on the Parterre tier of the Opera House and to allow six free admissions for each of such boxes. All other boxes and seats to be at the disposal of the Opera Company (Record, p. 27; Findings, par. III).

The Metropolitan Company, in turn, designated the persons to use such Parterre tier boxes by a provision in its by-laws assigning a particular box to each holder of 300 shares of its stock and granting to each such holder a license for the use thereof (Record, p. 28; Findings, par. IV).

By virtue of the plan outlined, therefore, the 10,500 shares of stock were divided into 35 blocks of 300 each. The 35 boxes on the Parterre tier were then distributed among the stockholders on the basis of a box for each 300 shares. Thus the owner or owners of each block received a license for the use of a designated box on the Parterre tier and with such license six free admissions to each performance.

The appellant was the owner and holder of 300 shares of stock and as incident thereto enjoyed a license to use

Parterre box #15 and became entitled to the six free admissions to each performance, as provided in the lease (Record, p. 29; Findings, par. VII). The appellant transferred her license to use Box 15 for 47 performances during the opera season of 1919-20, receiving as a consideration therefor, in the aggregate, $9525. The details of such sales were as follows:

1 Opening night performance	$ 550
11 Monday night performances, at $275 each	3025
11 Monday night performances, at $200 each	2200
23 Friday night performances, at $150 each	3450
1 "Prince of Wales" performance, Nov. 18, 1919	300
47	$9525

(Record, p. 29; Findings, par. IX).

Pursuant to general authority contained in Section 321 of the Revised Statutes and special authority given in Section 1309 of the Revenue Act of 1918, the Treasury Department, under date of June 19, 1919, promulgated Regulations 43, Revised, Article 25, sub-paragraph (6) of which reads:

> "The owners of a certain opera house, in leasing it to an opera company, reserve for their own use the whole parterre tier of 35 six seat boxes, paying therefor annually the sum of $70,000. These boxes are distributed among the various owners, $2000 a year being paid for an annual lease of each. There are no similar boxes in the house, but the established price of each seat in the boxes in the next tier, which

> is less desirable, is $10 per seat. The number of performances during the season is fixed in advance at 100. Each lessee of such a box on paying the $2000 for the season must pay a tax of at least $600 (100 times 10% of 6 times $10), to be paid over in turn to the opera company and the Collector of Internal Revenue. This minimum figure for the tax is based on the established price of the box seats which are the most nearly similar, but which are less desirable."

December 30, 1919, the plaintiff made a return and paid a tax upon her license based upon the price of boxes in the next tier. Such return was in conformity with Regulations 43, which subjected the transaction to the tax provided by Paragraph (5) (Record, p. 30; Findings, par. XI).

Prior to the date of such return the Metropolitan Company had requested the Commissioner of Internal Revenue for a ruling with respect to the application of Section 800 (a), Revenue Act of 1918, as applied to the transactions above set forth. Under date of December 24, 1919 the Commissioner ruled that in addition to the tax imposed by Paragraph (5) any stockholder selling a ticket for admission to any of the boxes in question was likwise subjected to the tax imposed by Paragraph (3) (Record, p. 30; Findings, par. XII).

In specifying the method for computing such tax under Paragraph (3) the Commissioner ruled that the price of a box seat in the second tier (grand tier) should be taken as the established price of the appellant's box. That price, to wit, $60, was required to be deducted from the amount realized by the appellant on the transfer of her license as aforesaid and the remainder was to be taxed at the rate of 50%.

The appellant made her return and paid her tax accordingly, said return being made under protest, because of duress and in order to avoid penalty. Thereafter she duly presented her claim to the Commissioner for a refund, which was rejected (Record, pp. 30-1; Findings, pars. XII, XIV). The appellant then presented her petition to the Court of Claims, instituting the present proceedings.

Specification of Errors.

The appellant submits that the court erred in the following particulars:

1. In holding that the act of the appellant in filing a return and paying a tax upon such sale under Paragraph (5) constituted an admission that there was an established price at the ticket office for her license; and in holding that such admission rendered the sale taxable under Paragraph (3).
2. In holding that Section 800 (a), Revenue Act of 1918, required construction.
3. In construing Paragraph (3) of the Act as imposing a tax upon the sale of appellant's admission privileges.
4. In entering judgment dismissing appellant's petition.

Summary of the Argument.

I. The Findings of Fact Do Not Sustain the Court's Conclusion That the Sale Was Taxable Under Paragraph (3), Sec. 800 (a), Revenue Act, 1918.

II. The Statute Is Plain, Clear and Unambiguous and Shows No Intent to Tax the Sale of Stockholders' Boxes.

III. It Is Well Established That Statutes Plain, Clear and Unambiguous in Their Terms Require No Construction.

United States v. *Goldenberg,* 168 U. S. 95, 102-103.
11 *Ency. U. S. Sup. Ct. Rep.,* 110.
Franklin Sugar R. Co. v. *United States,* 202 U. S. 580, 582.
United States v. *Fisher,* 2 Cranch. 358, 386.
Hamilton v. *Rathbone,* 175 U. S. 414, 421.
Crawford v. *Burke,* 195 U. S. 176, 189.
Northern Securities Co. v. *United States,* 193 U. S. 197, 358-360.
Commonwealth v. *Martin,* 17 Mass. 359, 362.

IV. It Is Impossible to Compute a Just and Equable Tax under Paragraph (3) as Construed by the Court

V. The Construction of Paragraph (3) by the Court Enlarges and Extends Its Terms, Contrary to the Canons of Construction.

Insurance Co. v. *Ritchie*, 5 Wall. 541.

Folsom v. *United States*, 160 U. S. 121, 127.

United States v. *Goldenberg*, 168 U. S. 95, 102-103.

Gould v. *Gould*, 245 U. S. 151, 153.

United States v. *Field*, 255 U. S. 257, 262.

Smietanka v. *First Trust & Savings Bank*, 257 U. S. 602, 605-606.

VI. Conclusion.

ARGUMENT.

I.

The findings of fact do not sustain the court's conclusion that the sale was taxable under Paragraph (3), Section 800 (a), Revenue Act 1918.

Paragraph (3) of Section 800 (a) imposes a tax upon tickets sold elsewhere than at the ticket office at a price in excess of the established price therefor at such ticket office.

To establish that the sales of appellant's license were subject to this tax, four facts must be found to exist:

> 1. That the sales were made elsewhere than at the ticket office.

The court has found that the sales were made by appellant through her personal agent.

> 2. The price at which the sales were made.

The court, on the admitted facts, finds this to be $9525.

> 3. That the license sold had an established price at the ticket office.

The court has not so found.

> 4. The excess of the sales price over the established price at the ticket office.

The court has not found this fact.

In lieu of the third fact the court has found the admitted fact that

> "On or about December 30, 1919, the plaintiff without protest, made a return and paid a tax thereon

under the provisions of Section 800 (a), Paragraph (5), of the Revenue Act of 1918, said return being based upon an admission price of $60 per performance" (Record, p. 30).

As a conclusion of law the court has held that when the appellant voluntarily acquiesced in the provisions of the Regulations ruling that the price of the most nearly similar box should be the basis of a tax on her box under Paragraph (5), such price "necessarily became the established price upon which to base the tax imposed by Paragraph (3)" (Record, p. 33).

In lieu of the fourth fact the court has construed Paragraph (3) as imposing a tax upon the excess of the sales price over the price which appellant has conceded may be used as the basis of tax under Paragraph (5).

The court errs in two particulars.

First. The fact is found as an alleged admission of the appellant. The admission does not have the effect ascribed to it by the court.

Treasury Regulations 43, (*supra,* p. 7) recited that there were no boxes similar to the parterre boxes, that boxes in the next tier above them were less desirable but most nearly similar, and ruled that parterre boxes were taxable upon the price of such most nearly similar boxes.

Appellant complied with the Regulations by making her return and paying the tax prescribed therein.

Paragraph (5) imposes a tax upon a distinct and specifically described class of admissions having no established price, and adopts as the basis of tax the price for which similar seats are sold. In paying a tax assessed under Paragraph (5) pursuant to Treasury Regulations 43, ap-

pellant admitted only that which was prescribed in the Regulations, namely, that she was the lessee of a parterre box; that there were no boxes similar to parterre boxes; that the boxes in the next tier were most nearly similar and sold for $60; and she consented to pay a tax on such minimum figure without protest.

This is not an admission that there was an "established price" for her box at the ticket office or elsewhere. Nor is it an admission or consent that Paragraph (3) may be so construed as to adopt such "minimum figure" as the basis for a tax upon a sale of the right to use her box, as distinguished from the tax under Paragraph (5) upon her rights in the box.

SECOND. To give effect to the alleged admission the court construes Paragraph (3).

The soundness of the conclusion as to the effect of the alleged admission depends, therefore, upon the validity of the construction. If the construction of the statute is invalid, the conclusion as to the effect of the alleged admission falls. That the construction placed upon Paragraph (3) by the Court of Claims is invalid is hereinafter demonstrated.

II.

The statute in question is plain, clear and unambiguous, and shows no intent to tax the sale of stockholders' boxes.

The terms of the statute are clear, explicit and unequivocal. It distinctly describes various classes of admissions and sales thereof. A distinct tax is provided for each class and each sale.

The statute provides for the following:

Paragraph (1): A general tax of 10% upon all paid admissions; to be paid by the purchaser.

Paragraph (2): A tax upon free or reduced rate admissions at the rate of 10% of the price charged other persons for the same or similar accommodations; to be paid by the person admitted.

Paragraph (3): An additional tax upon all paid admissions having an established ticket office price, when the tickets are sold outside of the ticket office at excess prices. This tax is to be paid by the seller.

Paragraph (4): A tax upon sales of tickets by proprietors, managers or employees equivalent to 50% of the amount by which the sales price exceeds the regular or established charge; to be paid by the seller.

Paragraph (5): A tax of 10% upon admissions,—distinguished from paid admissions—to persons having the permanent use or lease of boxes; the tax to be computed upon the amount for which

a similar box is sold and to be paid by the lessee or holder.

Paragraph (6): A tax upon admissions to cabarets, etc.; the tax to be computed upon an arbitrary percentage of the charge for refreshment service, etc., and to be paid by the person admitted.

In each case the class of admission taxed, the basis of the tax and the person required to pay the same are painstakingly described.

Under Paragraph (3) one who sells an admission ticket at a place other than the ticket office pays, as a tax, a fixed percentage of the amount by which the price received exceeds "the sum of the established price therefor at such ticket office plus the amount of any tax imposed under Paragraph (1)."

Under Paragraph (5) one who has the permanent use, or lease for the use, of a box pays a tax of 10% of "the amount for which a similar box * * * is sold."

A Parterre boxholder sells her right to the use of the box. Are the proceeds of the sale subject to a tax under Paragraph (3)? It is perfectly clear that Paragraph (3) does not so provide.

In the first place Paragraph (3) provides for a deduction, from the sales price, of the established price of the ticket at the box office. Congress was aware that there was no established price for leased boxes. It said so in Paragraph (5), where it taxed the boxholder's right to admission, by providing that the basis of the tax should be "the amount for which a similar box * * * is sold."

In the second place, Paragraph (3) provides for a deduction, from the sales price, of "the amount of any tax

imposed under Paragraph (1)." Congress was aware that a boxholder paid no tax under Paragraph (1). It said so in Paragraph (5) by providing solely for a tax against boxholders "in lieu of the tax imposed by Paragraph (1)."

Paragraph (3), by its plain terms, deals with tickets of admission, having an established price at the theater ticket office, which are taken outside of the ticket office and sold at a price in excess of the sum of the established ticket office price plus the Paragraph (1) tax. Its terms are wholly inappropriate to cover a class of admissions which are never sold at the box office, have no established price there, and bear no tax under Paragraph (1).

Congress provided that every person who paid for admission to a place of amusement should pay a tax.

It provided that whenever the ticket was acquired from the box office and resold to another the seller should pay an additional tax, based upon the excess of the amount he received over the sum of the amount he had paid for the ticket plus the amount he had paid as a Paragraph (1) tax.

It provided that when the proprietors of a theater sold a ticket in excess of the regular established price they should pay one-half of such excess. No mention is made of a deduction for a Paragraph (1) tax—this for the obvious reason that it is an initial sale by those managing the theater.

It provided that persons admitted free should pay a tax based upon the price of the same or similar accommodations.

It provided that persons admitted to cabarets, where the admission price could not be distinguished from the refreshment price, should pay a tax upon an admission price arbitrarily determined.

It provided that boxholders whose admission did not result from the purchase and sale of a ticket but rather from the right to a permanent use of a box or from a lease thereof, should pay a tax based upon the amount for which a similar box was sold. Had the intention been to impose a tax upon the sale by a boxholder of the admission privilege the intention could readily have been expressed by appropriate terms in Paragraph (3), or in an additional paragraph.

No difficulty was experienced in describing the several classes of admission or the particular sales of tickets subject to tax. Although providing a tax upon the privilege of enjoying the use of boxes, the statute does not, either directly or by implication, provide for a tax upon the sale of their privileges by boxholders. Whether such omission may be supplied by the courts is a question to be answered by the application of the principles of construction.

III.

It is well established that statutes plain, clear and unambiguous in their terms require no construction.

The decision of the Court of Claims, sustaining the contentions of the Government, appears to be an attempted application of the doctrine that statutes must be construed so as to effect the legislative intent; at all events, such was the burden of the Government's argument and the main subject of discussion in the Court's opinion.

As to the correctness of the proposition of law there can be no dissent. The fallacy of the decision is that it assumes that Section 800 (a) requires construction. Although advancing no reason therefor, in effect, the Court amends Paragraph (3) by construction in order to give effect to its conception of an unexpressed legislative intent. In so doing, it disregards the primary rule that the intent of the legislature is to be found in the language of the statute.

> "The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent." *United States v. Goldenberg,* 168 U. S. 95, 102-103.

The court argues that since there are no terms in Paragraph (5) exempting the sale of boxholders' licenses from taxation under Paragraph (3) it must have been intended that they should be so taxed. This is a complete *non-sequitur.*

Surely, the mere facts that the provisions of Paragraph (3) are inappropriate to subject such transactions to a tax, and that the provisions of Paragraph (5) do not exempt them from the terms of Paragraph (3), do not invoke construction. They do not give rise to any ambiguity. They are consistent and make for clarity. Hence, there is no occasion for construction, and the Court will decline to legislate.

In *11 Ency. U. S. Supreme Court Reports,* p. 110, the principle is stated as follows:

> "Where a statute is expressed in plain and unambiguous terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Where the intent is plain, nothing is left for construction. The province of construction lies wholly within the domain of ambiguity."

To the proposition above stated, more than thirty cases in this court are cited, together with other cases expressing the same rule in different terminology.

Referring to a few of the cited cases, we find a very clear expression and a very definite application of the rule. In *Franklin Sugar R. Co.* v. *United States,* 202 U. S. 580 (at p. 582) the court said:

> "The section needs no interpretation. It is clear that it subjects merchandise to the duties prescribed by law at the time it is withdrawn for consumption."

The statement above quoted, *i. e.*, "Where the intent is plain, nothing is left to construction", is found in the opinion of Chief Justice Marshall in *United States* v. *Fisher,* 2 Cranch, 358 (p. 386).

In *Hamilton* v. *Rathbone,* 175 U. S. 414 (p. 421) the court said:

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create, an ambiguity."

And the court refused to resort to such prior acts to discover the legislative intent.

In *Crawford* v. *Burke,* 195 U. S. 176 (p. 189), the court said:

> "The language of this section is so clear as to require no construction."

The doctrine was exhaustively discussed by Harlan, J., in *Northern Securities Co.* v. *United States,* 193 U. S. 197 (pp. 358-60).

In commenting upon the rule it was there stated:

> "It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention by the words used" (p. 358).

Further, quoting Chief Justice Marshall, it was said:

> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction" (p. 358).

The opinion also adopts the language of the Massachusetts Court, in *Commonwealth* v. *Martin,* 17 Mass. 359, 362, as follows:

> "It is not justifiable in this, any more than in any other case, to imagine ambiguities merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms, as to preclude the exercise of ingenuity in raising doubts about its construction."

IV.

It is impossible to compute a just and equable tax under Paragraph (3) as construed by the court.

A practical application of the statute as construed by the Court of Claims demonstrates the error into which it has fallen.

For illustration, consider a theater ticket selling at the ticket office for $3.00. The purchaser must pay, in addition, the Paragraph (1) tax of 30 cents. Assume that the purchaser resells the ticket at some place other than the ticket office for $4.00.

This resale is taxable according to the plain terms of Paragraph (3). The tax is computed as follows:

Sales price other than at ticket office		$4.00
"Established price therefor at such ticket office"	$3.00	
"Tax imposed under Paragraph (1)"	.30	
"Sum" of above		3.30
"Excess"		.70
Tax at 50% of Excess		.35

Compare with this a computation of the tax upon the sales of the right to use appellant's box. The computation is that prescribed in the Commissioner's ruling (Statement of The Case, p. 8). The construction of the statute is that adopted by the Court of Claims herein.

The first factor is the sales price at some place other than the ticket office. The appellant, through her agent, sold the use of her box for 47 performances for $9525.

The next factor is the sum of two figures. The first figure is "the established price therefor at such ticket office." This figure does not exist. Parterre boxes are not sold at the ticket office and have no established price there, or elsewhere.

To supply this figure the court finds that boxes in the tier above were "substantially similar" to parterre boxes and sold for $60; that the Government adopted this as the basis for appellant's tax under Paragraph (5); that the appellant paid that tax without protest; and concludes that $60 necessarily became the established price upon which to base the tax imposed by Paragraph (3).

As prescribed by Congress in Paragraph (3), the computation was to be made upon,

> "The sum of the established price therefor at such ticket offices plus the amount of any tax imposed under Paragraph (1)."

As Paragraph (3) has been construed and amended by the Court of Claims it reads:

> "The sum of the established price therefor at such ticket offices, *or if there be no such established price therefor at such ticket offices, then the amount for which a substantially similar box is sold, or the amount which may have been used by a boxholder in making a return in compliance with Treasury Regulations 43,* plus the amount of any tax imposed under Paragraph (1)."

Only in this way is the first figure supplied.

The second figure is also missing. The court does not undertake to supply it. It ignores it. As it is a credit

to which all others, paying a tax under Paragraph (3), are entitled, it would seem to be important. This figure is the amount of any tax imposed under Paragraph (1). Leased boxes pay no tax under Paragraph (1).

Such boxes do, however, pay a tax of 10% upon the price of a similar box. The rate under Paragraph (1) is 10%. There would seem to be no reason for depriving boxholders of a credit on account of the payment of such tax. To do so results in taxing boxholders at a higher rate than others under the same paragraph of the statute. But such is the decision of the Court of Claims.

Under the statute as so construed by the Court of Claims, the tax against Parterre boxholders, applied to the case at bar, is computed as follows:

Sales price other than at ticket office (47 performances)		$9,525.00
"The amount for which a substantially similar box or seat is sold" (in lieu of the figure prescribed by the statute, i. e., "the established price therefor at such ticket offices.") 47 @ $60	$2,820.00	
Tax under Paragraph (1) (non-existent and ignored by the court)	000.00	
"Sum" of above		2,820.00
"Excess"		$6,705.00
Tax at 50% of Excess		3,352.50

V.

The construction of Paragraph (3) by the court enlarges and extends its terms, contrary to the canons of construction.

It sufficiently appears from the foregoing that the court has not found the appellant's sales to be within the terms of Paragraph (3), and in order to sustain the tax as imposed has added to the section the terms which it deems necessary for that purpose.

No well-defined theory is presented to justify this result. The court says, "it was not assumed that such persons would sell tickets for these boxes" (Record, p. 33). But it concludes that it was just such sales that were intended to be taxed. The Government argued that the general purpose of Congress was to tax all sales.

From any viewpoint, however, it is clear that the judgment is contrary to the well established canons of construction.

In *Insurance Co.* v. *Ritchie,* 5 Wall. 541, the repeal of the statute, if enforced according to its terms, had the effect of depriving the federal court of jurisdiction over pending as well as other suits respecting actions involving the internal revenue statutes, in the absence of diversity of citizenship. It left the federal courts with jurisdiction over cases involving questions under the customs revenue statutes irrespective of diversity of citizenship. The Court said (pp. 544, 545):

> "It is quite possible that this effect of the Act of 1866 was not contemplated by Congress. • • • It is certainly difficult to perceive a reason for dis-

> crimination between such suits and suits under the internal revenue laws; but when terms are unambiguous we may not speculate on probabilities of intention."

In *Folsom* v. *United States*, 160 U. S. 121, certain federal statutes, if literally interpreted, provided for greater rights of appeal from convictions for minor offenses than were provided for appeals from convictions for capital offenses. A construction of the statutes was sought upon the theory that Congress could not have intended such a result. In passing upon the question this Court said:

> "It is said that this involves the absurdity that convictions for minor offenses are reviewable on a second appeal, while convictions for capital and infamous crimes are not. Doubtless in some cases where the language of a statute leads to an absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it, modifying the meaning of the words so as to carry out the real intention, but where the intention is plain it is the duty of the Court to expound the statute as it stands. As far as Congress went in conferring this right to a second appeal, the intention is clear and the language used unambiguous. The objection really is that Congress should have gone farther and given by this Act a second review in this Court in cases of convictions for capital and infamous crimes in the Territories. It may be that there was an oversight in that particular, but if there were, we certainly cannot supply it by construing the 15th section as carrying appellate jurisdiction over such cases to the Circuit Courts of Appeals, and so enlarging that jurisdiction into something other and different from 'the same appellate jurisdiction' as is exercised in reviewing the

> judgments of District and Circuit Courts under Section 6 of the Act." (p. 127).

In *United States* v. *Goldenberg*, 168 U. S. 95, an Act of Congress provided that the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise should be final and conclusive, unless the interested parties should, within ten days after such decision, or within ten days after the payment of the duties, give written notice of objections thereto, adding in the same sentence:

> "and if the merchandise is intended for consumption shall pay the full amount of the duties."

The statute further provided that upon such notice and payment the objection should be certified to a reviewing body and passed upon by it.

The question certified to the Supreme Court was whether or not both the payment and the giving of notice within ten days after the decision of the collector were conditions precedent to a review of the objections.

Looking outside of the statute it was clearly demonstrated that the intent of Congress was to compel the prompt decision upon objections to the duty and the prompt payment of the tax. Construed literally, the importer was enabled to file his objections within ten days after the decision of the collector and refrain from paying the duty. The objections could not be certified to the reviewing board until payment was made, and the goods having been delivered into the possession of the importer, payment could be indefinitely deferred and until the recovery thereof by the Government in a plenary suit. This situation was directly contrary to the intent of Congress to be found outside of the statute itself.

To give effect to such intent it was necessary to construe the statute by adding a requirement that payment as well as the giving of notice should be made within ten days of the collector's decision. The Court said (pp. 102-103):

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense; Holy Trinity Church *v.* United States, 143 U. S. 457; it involves no injustice, oppression or absurdity, United States *v.* Kirby, 7 Wall. 482; McKee *v.* United States, 164 U. S. 287; there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. *Non constat* but that Congress believed it had sufficiently provided for payment by other legislation in reference to retaining possession until payment or security therefor; or that it failed to appreciate the advantages which counsel insists will inure to the importer in case payment does not equally with protest follow within ten days from the action of the collector; or that, appreciating fully those advantages, it was not unwilling that he should enjoy them. Certainly, there is nothing which im-

peratively requires the Court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do. Under these circumstances, all that can be determined is that Congress has not specifically provided that payment shall be made within ten days as one of the conditions of challenging the action of the collector, and hence there is no warrant for enforcing any such condition."

The rule of construction just examined applies with even greater force and strictness to statutes levying taxes. As to such statutes, the courts are especially reluctant to indulge in construction in the absence of patent ambiguity and will not extend or enlarge the statutes so as to impose a tax where none is specified therein.

In such cases the rule as stated in *Gould* v. *Gould* 245 U. S. 151 (p. 153) is:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen. *United States* v. *Wigglesworth,* 2 Story, 369; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468, 474; *Bensiger* v. *United States,* 192 U. S. 38, 55."

This rule was affirmed in *United States* v. *Field,* 255 U. S. 257, 262. Here the Government sought a construction of the Revenue Act of 1916, providing for inheritance taxes, justifying the imposition of a tax upon the execution of a power of appointment. In applying the rule above quoted, the court said (p. 264):

> "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration."

In *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, the question presented for decision was "Whether under the income tax law of 1913, income held and accumulated by a trustee for the benefit of unborn and unascertained persons was taxable." The Court was asked to construe the statute so as to require payment of the tax by the fiduciary upon the income of beneficiaries not *in esse*. Chief Justice Taft said (pp. 605, 606):

> "No language in the act included a tax on income received by a trustee by him to be accumulated for unborn or unascertained beneficiaries. There was indicated in the taxing paragraph A the congressional intention to tax citizens everywhere, and non-citizens, resident in the United States, including persons, natural and corporate, on income from every source less allowed deductions. But nowhere were words used which can be stretched to include unborn beneficiaries for whom income may be accumulating. It may be that Congress had a general intention to tax all incomes whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise the intention can not be enforced by the courts. The provisions of such acts are not to be extended by implication."

In the last two cases nothing could have been clearer than the Congressional intent. In the first, that intent was

to impose a tax upon the devolution of title by inheritance. It did not occur to Congress to specifically provide for a tax upon deferred powers of appointment. Although the estate in question would escape taxation entirely, the court refused to extend or enlarge the statute.

In the second case, the Congressional intent was to tax the income of *cestuis*. It neglected to provide for the income of unborn and unascertained *cestuis*. This court refused to extend or enlarge the statute to include such income.

From these cases, two principles conclusively appear:

1. Where a statute is clear and unambiguous no mere omissions will be supplied by judicial construction.
2. Where the language of the statute is inappropriate to impose a tax upon the *res* in controversy, the court will not extend or enlarge the statute to include it, even though it be within the general legislative intent.

These principles require a reversal of the judgment of the Court of Claims.

VI.

Conclusion.

The facts found by the court can be held to sustain a tax against appellant under Paragraph (3) only when her tax return under Paragraph (5) is taken as an admission of liability under Paragraph (3). The tax return has no such legal effect.

Under the findings, the court has written into the statute a provision which it does not contain. The statute, being plain, clear and unambiguous, is not open to construction; and the construction indulged, amplifying the statute in favor of the Government, is contrary to the well established principle of law that statutes imposing taxes will be construed in favor of the taxpayer.

The judgment should be reversed and remanded to the Court of Claims with direction to enter judgment for the appellant upon her petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 119.

GEORGINE ISELIN, Appellant,

against

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS OF THE UNITED STATES.

REPLY BRIEF FOR APPELLANT.

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APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE APPELLANT.

The argument of the Government in its brief may fairly be summarized as contending:

(1) That Section 800(a) was intended to apply to the sales in question;

(2) That the statute is applicable thereto; and

(3) That Congress, having reenacted the statute after its construction by the Treasury Department and others, must be held to have adopted such construction.

The first two contentions are covered by our main brief, but some of the arguments now advanced by the Government to support them require reply.

The third contention was not discussed in our original brief and is therefore replied to here.

ARGUMENT.

I.

No Legislative Intent to Tax the Sale of Leased Boxes Can Be Discovered.

There has been a labored effort from the beginning of this case to discover a legislative intent to tax the transactions in question.

Whether we take the argument of the Government in the Court of Claims, the decision of the Court of Claims, or the brief of the Government in this Court, we think it clearly appears that the tax imposed in this case is sought to be sustained upon two theories, namely: First, upon the ground that the intent to tax the sales in question is found in the terms of the statute; and, Second, upon the ground that such intent is found in considerations outside of the statute.

The two theories are widely divergent. It is the failure to recognize the distinction between the two, which has resulted in the errors complained of.

If the statute is plain, clear and unambiguous, it is the function of the courts to apply it as it reads and to give effect to the legislative intent clearly expressed. In such case there is no room for construction.

If the statute is ambiguous and its application cannot be determined from its terms, it is necessary to indulge in construction. A construction of the statute requires that the legislative intent be discovered. This, for the obvious reason that the intent does not appear in the statute itself.

As we have previously pointed out, both the Govern-

ment, in its several briefs, and the Court of Claims, have failed to give any consideration to the question as to whether the statute is open to construction. The statute by its terms imposed no tax upon the transaction in question. No inquiry was made as to whether this was a clear and plain omission or whether it was the result of ambiguity and uncertainty in the terms of the statute. Having discovered the omission, the Court of Claims proceeded to supply it by construction, as contended for by the Government. To support this procedure, it was asserted that Congress intended to impose the tax.

The error consists in confusing "omission" with "ambiguity". The fact that certain sales are clearly omitted from the statute, does not establish that the statute is ambiguous and requires construction. If a statute, as here, clearly enumerates certain ticket sales and prescribes that they shall be subject to specific taxes, but omits sales of a different class of admissions to which none of the taxes imposed can be applied, it does not follow that the statute is ambiguous and open to construction. The statute is still plain and clear.

This Court, as pointed out in Title V of our main brief, has repeatedly held that such omissions do not render a statute ambiguous, and that statutes levying taxes will not be extended or enlarged by construction to include them.

In short, as demonstrated in our main brief, the statute is plain, clear and unambiguous, imposes no tax upon the sales in question and is not open to construction. Inasmuch, however, as the Government renews its contention here with respect to the legislative intent, both upon the face of the statute and outside of it, we shall reply thereto.

The Alleged Intent Does Not Appear in the Terms of the Act.

The omission by Congress to enumerate the sales of the right to use stockholders' boxes and to provide a method of taxing such sales is the sole ground advanced by the Court of Claims as a justification for the construction which it indulges. In its opinion at Record, p. 33, the Court says:

> "It was not assumed that such persons would sell tickets for these boxes."

It is scarcely logical to proceed from this premise to a conclusion that Congress intended to tax such sales, but the Government argued for it and the court has reached it. In reaching such conclusion the Court of Claims, in complete contradiction of its opinon that Congress "assumed that such persons would not sell tickets for such boxes", says that:

> "The intent and purpose of Congress was to impose a tax in just such a case" (Record, p. 34).

As to just where this intent is to be found, the court does not say, but the opinion, with like inconsistency, further indicates that the court considered that such intent was found within the language of the statute. The court says (Record, p. 33):

> "When Congress enacted Paragraph (5) of the statute, the evident purpose was to reach by a larger tax persons who were able to have the permanent use of boxes in an opera house, or who had a lease for such boxes."

A larger tax than that imposed upon what? The statute will be searched in vain for the answer to this question. No such purpose is evidenced in the words of the statute or elsewhere. In fact, the contrary plainly appears. If by

this statement the court merely meant that a licensed box similar to a box which was sold for $60 should pay a greater tax than a one dollar admission ticket, the statement is correct. But the tax is an *ad valorem* tax.

Under Paragraph (1) all paid admissions are taxed at the rate of 10%. If the paid admission is $1, the tax is 10 cents. If the paid admission is $60, the tax is $6. Under Paragraph (5) the tax is 10% of the price at which similar accommodations are sold. If a similar accommodation sells for $1, the tax upon a leased box is 10 cents. If a similar accommodation sells for $60, the tax upon a leased box is $6. The tax imposed upon leased boxes is upon an exact parity with the tax imposed upon general admissions. The same percentage is applied to each of the two classes.

Again the Court of Claims says:

> "Manifestly, it was the intent and purpose of Congress that if tickets were sold for more than $.50 in excess of the established price, plus the amount of tax imposed under Paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess should be imposed" (Record, p. 33).

This was undoubtedly the intent with respect to certain tickets. What tickets? The tickets described in Paragraph (3), and only the tickets for which such excess tax is therein prescribed. These are tickets having an established price at the ticket office and paying a tax under Paragraph (1). Neither of these characteristics pertains to permanently used or leased boxes described in the text under Paragraph (5), and there is nothing in the language of the statute to show that permanently used or leased boxes were intended to be covered by Paragraph (3).

If by a "larger tax" the Court of Claims meant that Congress intended to tax licensed boxes at a higher rate or to impose upon them an excess tax not paid upon other admissions, it may likewise be said that no such intent is to be found within the language of the statute. No provision imposing such a tax or expressing such intent is contained therein.

And we may well inquire at this point as to why any such intent should be presumed. What is there in the nature of a parterre box, or the circumstances under which it is held, which would warrant any such burden of taxation?

The production of grand opera is possible only through the means of philanthropic subsidies. The appellant's license rests upon a contribution to that subsidy through an original investment in the Metropolitan Company of $30,000, upon which there was no hope or expectation of receiving a return. The Company has never realized any profit, and has never distributed any profits to its stockholders (Record, p. 29).

In addition, the appellant has obligated herself to an annual assessment of $4,500 for the purpose of subsidizing the producing company. It is this original investment and this annual subsidy which make it possible to sell the "similar accommodations" at $60 per box and the other accommodations in the opera house at the lower prices charged to the general public.

Being under such burden of great expense for the benefit of all others who attend the opera, why should Congress desire to add to such burden by imposing "a larger tax" upon the appellant than assessed against those enjoying privileges most nearly resembling hers?

The Alleged Intent Cannot Be Discovered in Considerations Extraneous to the Statute.

To the Government it appears that Congress was confronted with the urgent necessity of supplying enormous revenues, and, casting about for objects of legitimate excess tax, determined to levy a tax upon amusement admissions, and to exact a higher tax for all admissions disposed of at excess prices.

It is then argued that with such purpose in view, the dictates of reason and common sense are violated if Paragraph (3) is not held to impose a tax upon appellant's sales.

To establish the general purpose as contended, the usual course would have been to expound its scope, view the situation dealt with, and invoke the aid of the Congressional Record and Committee Reports. This the Government is content to omit.

Supplying the omission, we find the argument to be without support.

In the first place, millions of people were patronizing places of amusement. By compelling them to pay a tax of 10% upon the price of admissions, a very considerable income would result to the Government.

In the second place, the practice of purchasing tickets to places of amusement and reselling them at prices in advance of the ticket office price was notorious. This practice was in ill repute in the public mind, and it seemed expedient to Congress to require persons indulging therein to contribute to the Government for revenue purposes half of the excess prices realized. This tax was provided for in Paragraph (3). Chairman Kitchin, of the House, Ways & Means Committee, which framed the Bill (Cong. Rec., 65th Cong., 2nd Sess., Vol. 56, Part XII, p. 661), in presenting it

to the House, made the following comments (Cong. Rec., 65th Cong., 2nd Sess., Vol. 56, Part XII, p. 696):

> "Title VIII is the tax on admissions to places of amusement, etc. . . . We have also entered a provision catching what they call the theater ticket scalper, the man who sells theater tickets at the news stands of hotels for the theaters in his city."

Evidence was taken by the Senate Finance Committee in its hearing on the Bill covering the question of "scalpers" (Finance Committee Hearings, 1918, p. 206).

There were other classes of admissions which Congress evidently thought should be subjected to a tax: free admissions for which a tax was provided under Paragraph (2); admissions disposed of by proprietors, managers or employees, for which a tax was imposed under Paragraph (4); and amusements afforded in conjunction with refreshments, the prices of which could not be definitely separated from the refreshment price, for which a tax was imposed under Paragraph (6).

There were admissions to theaters and operas enjoyed by persons who had the permanent use of, or who leased, theater accommodations. These privileges had no established price or value, and a special provision was made for them in Paragraph (5). As to this class of admissions, there is nothing in the Committee Report, in the Congressional Debates, or in the field of common knowledge, evidencing a general practice anywhere to sell or transfer the license to use such amusement privileges as was the case of the ticket scalper.

Counsel for the Government appear to proceed upon the theory that appellant's income from the sales in question escapes taxation. Such is not the case.

As previously pointed out, appellant's license rests upon an original investment of $30,000 and is contingent upon the payment of an annual assessment of $4,500. The Court of Claims is of the opinion that it was not assumed by Congress that such persons would sublet their privileges of admission. If that be the reason no tax was imposed in connection with such subletting, well and good. But such assumption on the part of Congress is no justification for amending the statute by the courts.

We submit, however, that a more persuasive reason for omitting a tax upon such sales under Section 800 (a) is that Congress assumed that persons enjoying such privileges in return for an investment of $30,000 and the payment of an annual assessment of $4,500 were of a class whose income would fall within the major brackets of the income tax provisions of the Revenue Act of 1918, and that any income received from the sale of their parterre box privileges would pay a tax thereunder. Certain it is, that the $9,525 realized by the appellant was so taxable.

With respect to the ticket scalper, for which special provision was made, no such assumption is possible. The standard prices of theater tickets in New York are $3 to $5. The scalper purchases tickets at these prices. He resells them at an advance of $.50, $1, or more, as explained by Chairman Kitchin upon the floor of the House (Cong. Rec., 65th Cong., 2nd Sess., Vol. 56, Part XII, p. 696). Obviously the scalper must sell thousands of these tickets before he is subjected to any income tax, and unless special provision were made therefor, the profits realized by him might escape taxation entirely.

A Congressional intent to tax the sale of the right to use stockholders' boxes is not found in the language of the statute. Considerations extraneous to the statute clearly

demonstrate that no such intent in fact existed, to be called into play were the statute ambiguous.

On the contrary, there is in the statute a careful enumeration of admissions and sales thereof subject to tax, and a studied method of applying the tax to each. Sales of the right to use stockholders' boxes are omitted. Furthermore, considerations extraneous to the statute disclose cogent reasons for omitting to tax such sales.

II.

The Statute Is Not Applicable to the Sales in Question.

In our main brief we pointed out that the statute could not be applied to the sales in question because its terms were wholly inapt and inappropriate (Point IV, p. 23).

The Government has advanced several arguments to establish that the statute is applicable, to which we make reply here.

The "Resale" Argument.

It is apparently fully appreciated that Paragraph (1) of the Act imposes a tax upon initial sales, and that Paragraph (3) imposes a tax upon resales. Without argument, the Government characterizes the sales in question as "resales" and proceeds to the conclusion that there can be no reason for refusing to apply the tax to such resales.

In addition to the fact that the statute, by its terms, is not applicable, this contention suggests another and conclusive argument. The sales in question were not resales. They were initial sales. The appellant was entitled to the occupancy of her box as one of the stockholders of the com-

pany, and not by any transaction of sale and purchase. Because it was not a sale, and therefore not taxable under Paragraph (1) of the Act, Congress provided a special tax under Paragraph (5). When appellant sold the right to occupy her box, such sale was an initial sale, not a resale. Since it was not a resale, such as that covered by Paragraph (3), it was not taxable thereunder.

The "Exemption" Argument.

It is argued that the statute is applicable because no exemption can be established under the principles of law governing exemptions.

The claim advanced by the appellant that Paragraph (3) did not apply to the sales made by her is distorted by the Government into a claim that the sales are "exempted" from taxation.

To support this, cases are cited with respect to the law applying to "exemptions". When a corporation is created, as in one of the cases cited, with a provision in its charter limiting the taxes that may be imposed upon it which exempts it from taxes applicable to other corporations, the question presented as to the scope and effect of such exemption is quite different from the question presented here. To impose a tax upon certain property, and to exempt certain classes of property otherwise included within the general scope of the Act is one thing. To impose a tax upon certain enumerated transactions, without including other transactions, is quite another thing.

We do not claim that the appellant's sales are exempted from taxation, but we do claim that no tax was ever imposed. The argument advanced and the cases cited are beside the point.

The Computation of the Tax.

In our main brief, Point IV, page 23, we demonstrated by a computation of the tax, that Paragraph (3) of the statute was wholly inapplicable. In reply to this, the Government seizes upon the inequality resulting from the lack of any credit to the appellant on the tax imposed by Paragraph (1), and argues that the appellant computed her own tax and cannot be heard to complain.

The point made seems to be that while the appellant could not claim any credit for a paragraph (1) tax, because none was due from her, nevertheless, she might have claimed credit for the Paragraph (5) tax which she had paid. It is argued that while the statute literally would not permit of this, it would be equitable for appellant to have made the deduction, and the Government would be satisfied if this Court should construe the statute equitably to permit it.

This argument merely calls for a further unwarranted construction of the statute and emphasizes the point made by us that the statute is wholly inapplicable and requires judicial revision in order to sustain the tax imposed.

It is further sought to shift the burden of the computation of the tax to the appellant. The answer to this contention is included in the reply to the claim that appellant is bound by her original tax return under Paragraph (5), which is discussed under the next sub-heading.

Admissions Against Interest.

The inapplicability of the statute and the injustice imposed upon the appellant by the decision of the Court of Claims is forcibly demonstrated by an examination of the contention that the existing situation results from the fact

that appellant made a return and paid a tax under Paragraph (5) without protest.

It should be noted that Regulations 43 required appellant to pay a tax under Paragraph (5) and prescribed the minimum basis of the tax as the established price of the grand tier boxes (Appellant's Brief, page 7).

Paragraph (5) required the payment of a tax upon leased boxes upon the basis of the established price of similar accommodations. Here there were no similar accommodations, and the Court of Claims has so found. The Department regulations held that the grand tier boxes were most nearly similar and therefore established a minimum basis for the tax. No other basis for computing the tax was or is discoverable, and appellant had no choice but to comply with the regulation. This she did without protest or objection and consented to pay the tax, notwithstanding the doubtful validity of the ruling.

At the time this was done there was pending a request for a ruling as to the liability of appellant and others under Paragraph (3). When the ruling was issued, it was to the effect that the appellant should pay the tax under Paragraph (3). The ruling prescribed that "The basis for computing this tax is the difference between the established price of the box seat in the second tier for that performance, as determined by Article 17 of the enclosed regulations and the price for which the ticket is sold" (Government Brief, p. 6).

Regulation 17 contains the following:

> "The person in control has, of course, the power to fix the price to be actually charged for admission. He has, therefore, the power to determine the established price. But as the established price is a matter

> of substance, not of name, the mere fact that he calls a price the 'established price' does not make it such. Nor does the price he decides to charge for a particular admission necessarily establish the price for that admission. If he arbitrarily sets different prices on admissions, under similar circumstances, to accommodations in all substantial respects similar, these different prices will not be the established prices of the respective admissions for which they are charged, but the highest price among them will be the established price of all such admissions."

It would seem, under this regulation, that the established price of the seats in question, if there can be said to have been any established price, was the price at which appellant sold the admissions. Although the regulations in question were enclosed with the ruling, the ruling absolutely forbade appellant to take such sale prices as the established prices and compelled her to use as the established price, the price of box seats in the grand tier.

Had the actual sales price been taken as the established price, of course there would have been no tax payable, because the established price and the sales price would have been equal. What the Government did was to require appellant to pay a Paragraph (5) tax on the basis of the price of grand tier boxes. Having done so without protest, the Government now says: "Your right to occupy the box is an initial sale. Your sale of that right is a resale. Having complied with our regulations as to the Paragraph (5) tax without protest, you have established the price on your box on a minimum basis. You will now be compelled to use that minimum figure as the established price of your box and pay the maximum tax of 50% on the excess of the sales price over that figure."

When appellant comes to make a return of her taxes in compliance with this ruling, she finds in the statute no method of computing the same and no provision for a credit to her for taxes already paid, such as other persons taxed under Paragraph (3) enjoy; because she fails to construe the statute to read an unwarranted credit into it, and complies literally with the Department rulings, the Government now says she has computed her own tax and cannot avoid the consequences.

The whole argument is anamalous and serves again to conclusively demonstrate the fact that Paragraph (3) is inapplicable to the sale in question. The effort to apply it results in a forced construction of the statute and a gross injustice upon the appellant.

"Device" for Avoiding Tax.

It is intimated by the Government that the method of handling the stockholders' admissions is a "device" to avoid the payment of the tax. It is argued that the statute must be deemed to apply to the transactions in question "because Congress did not intend that the tax should be avoided through any arrangement between the proprietors of the place of amusement and those occupying such relations to the proprietors that they had the permanent use of boxes" (Government Brief, p. 8).

The certificate of organization of the Metropolitan Company was executed in 1893 (Record, pp. 6-7). The stockholders' agreement relating to the license to use designated boxes was made in 1893 (Record, p. 21). The lease in question was made in 1908 (Record, p. 7).

It was by these documents that the arrangement for the use of boxes by stockholders, their reservation from the

lease for the exclusive use of the Metropolitan Company, and their assignment to stockholders was made. This was accomplished many years prior to the enactment of the admissions tax law and can scarcely be considered as a "device" designed to evade the provisions of the statute.

III.

There Has Been No Departmental Construction of the Statute Having the Force and Effect of Law.

It was contended by the Government in the court below that Paragraph (3) of the statute has been construed by the Treasury Department as imposing a tax upon the sale of the right to use a stockholders' box, that the rulings of the Department have been affirmed by the Attorney General, and that such Departmental construction has the force and effect of law.

The contention is not made here. It is argued, however, that the re-enactment of the statute after such rulings has established the construction contended for. As the two propositions are inter-related it is necessary to examine both.

Two Department rulings and an opinion of the Attorney General are referred to:

The first ruling is that contained in Regulations 43, Revised, Article 25, sub-paragraph (6). This is the ruling set forth in our main brief herein at page 7. The ruling prescribed that stockholders' boxes were subject to a tax under Paragraph (5); that there were no similar boxes in the house, but that the minimum basis for the tax should

be the price of the boxes in the next tier, which were the most nearly similar.

The second ruling relied upon is that made by the Commissioner of Internal Revenue under date of December 24, 1919. In that ruling the Commissioner prescribed that stockholders, in addition to paying the tax under Paragraph (5), were required, upon the sale of the right to use their boxes, to pay a tax upon the proceeds of such sale under Paragraph (3); and that the basis for computing the tax should be the difference between the established price of boxes in the next tier and the sales price. This ruling appears at Record, p. 30, and is referred to in our main brief herein at page 8.

It is further contended that the ruling of the Commissioner was concurred in by the Attorney General under date of March 22, 1920 (32 Op. Atty. Gen. 142).

The argument of the Government is: (1) That the ruling contained in Regulations 43 prescribed the price at which similar accommodations were sold as the established price upon which to compute the tax upon appellant's box under Paragraph (5); (2) That it follows, therefore, that the same basis must be taken for computing the tax under Paragraph (3) and that the ruling of the Treasury Department under date of December 24, 1919 to that effect was correct; (3) That this construction was confirmed by the Attorney General in his opinion; (4) That such rulings have the force and effect of law and are binding upon the courts as a construction of the statute.

The facts in connection with these several rulings are important. They are as follows:

The several rulings referred to were made with specific reference to the tax now before the court and in the proceedings now being reviewed.

Appellant paid her tax under Paragraph (5) in accordance with Treasury Regulations 43 (Record, p. 30; Findings, par. XI).

Prior to the payment of such tax the Metropolitan Company had requested the Commissioner of Internal Revenue for a ruling with respect to the application of the Act to the sales of the right to use stockholders' boxes.

The Commissioner's ruling of December 24, 1919, to the effect that such sales were taxable under Paragraph (3), was in response to such request (Record, p. 30; Findings, par. XII).

On January 28, 1920, appellant paid her tax in compliance with the ruling of December 24, 1919. Such payment was made under protest. (Record, p. 30; Findings, par. XIV).

After such payment under protest, the Treasury Department requested a ruling of the Attorney General. The Attorney General's opinion was to the effect that the sale was subject to a tax, but did not clearly state whether the tax should be imposed under Paragraph (3) or Paragraph (4) (32 Op. Atty. Gen. 142).

On October 3, 1920, appellant filed her claim for a refund.

In rejecting such application for a refund, the Commissioner rendered a decision ruling that the tax was payable under the provisions of Paragraph (4) (Record, p. 31; Findings, par. XIV).

The Court of Claims has held that the sale is taxable under Paragraph (3).

The rule of law invoked is quite clear, though it is sometimes rather loosely stated in the cases. The earliest case cited, and almost invariably cited, to support the rule is

Edwards' Lessee v. *Darby,* 12 Wheat. 206. In that case the court said at p. 210:

> "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

It thus appears at the outset, and no later case has effected any change in this respect, that the rule is a rule of statutory construction.

The same error persists in the argument of the Government here to which we called attention in our main brief and which is the error underlying the whole case. That error is the assumption that Paragraph (3) of the statute requires and is open to construction. The first answer to the contention of the Government, therefore, is that the rule can only be invoked in aid of construction and has no application where, as here, construction is not permissible.

This limitation to the rule was applied in *United States* v. *Graham,* 110 U. S. 219. The case concerned an Act of Congress passed in 1835. About a month thereafter, the Treasury Department construed the statute in circular instructions which it issued. The Navy Regulations adopted in 1865 accorded the same construction to the Act. From that time until 1883, when the case was decided, the construction had, with a single exception, been adhered to by the several Departments.

The court found, however, that the statute was so clear and explicit as not to be open to construction, and said at p. 221:

> "Such being the case, it matters not what the practice of the departments may have been or how

> long continued, for it can only be resorted to in aid of interpretation and 'it is not allowable to interpret what has no need of interpretation'. If there were ambiguity or doubt, then such practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous. *Edwards, Lessee* v. *Darby,* 12 Wheat. 206; *United States* v. *Temple,* 105 U. S. 97; *Swift & Co.* v. *United States,* 105 U. S. 691; *Ruggles* v. *Illinois,* 108 U. S. 526."

The limitation to the rule as thus expressed was applied in

> *Houghton* v. *Payne,* 194 U. S. 88, 99;
> *United States* v. *Johnson,* 173 U. S. 363, 378;
> *United States* v. *Alger,* 152 U. S. 384, 397;
> *United States* v. *Tanner,* 147 U. S. 661, 663.

The limitation is expressly stated in *National Lead Co.* v. *United States,* 252 U. S. 140, 145-146.

It has been definitely held that where a statute is plain and not open to construction the courts will restrict its application to its plain terms, notwithstanding an administrative construction to the contrary. This was the decision in *United States* v. *Field,* 255 U. S. 257, 262, where an administrative construction adopted by the Treasury Department was rejected.

There is a second limitation upon the rule, stated in *United States* v. *Finnell,* 185 U. S. 236, at p. 244, as follows:

> "Of course, if the Departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge."

This limitation is likewise supported in *Houghton* v. *Payne*, 194 U. S. 88, at p. 102, and *United States* v. *Graham*, 110 U. S. 219, 221.

A third limitation upon the rule was stated in 2 Lewis' Sutherland, Stat. Const. 890 (2d Ed.) to be as follows:

> "The Legislature is presumed to be cognizant of such construction [by those whose duty it is to execute a law], *and after long continuance*, without any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction."

A leading case stating the rule is *Pennoyer* v. *McConnaughy*, 140 U. S. 1. At p. 23 the court says:

> "The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

In the last named the rationale of the rule appears. It is a long continued policy with respect to the construction of the statute, relied upon by the Government and by those

affected by its provisions, and upon which property rights and methods of doing business have become established, which induces the courts, in a proper case for statutory construction, to give weight to the administrative ruling before completely overturning established rights and customs. *National Lead Co.* v. *United States,* 252 U. S. 140, 145-146.

The present case forcibly illustrates the soundness of this limitation. Here Department rulings have been made for the first time in the very proceedings preliminary to the present action. If the rulings made which compelled the payment of the contested tax by the appellant are final and conclusive and have the force and effect of law, the courts are completely ousted of jurisdiction. The mere statement of the facts completely refutes the contention of the Government.

It is even doubtful whether there has been any Departmental construction of the statute such as is entitled to respect from the courts within even the general statement of the rule.

The Commissioner of Internal Revenue instructed the claimant to pay under the provisions of Paragraph (3). The matter was submitted to the Attorney General and he ruled that the sales were taxable, mentioning both Paragraph (3) and Paragraph (4) and not indicating definitely which should be applied. The Commissioner, in rejecting the claimant's claim for a refund, ruled that the sales were taxable under Paragraph (4).

It is clear that both sections do not apply. There has been no definite ruling by the Department as to which does apply.

It is submitted that since Paragraph (3) of the statute is not open to construction, Departmental rulings cannot

be invoked in aid of its construction; that either of the inconsistent rulings of the Department is clearly wrong, and therefore not available under the rule in aid of construction; that there has been no Departmental ruling continued in effect for such length of time as to bring it within the provisions of the rule invoked; that the rule has no application to an initial Departmental construction in the proceeding brought before the court for review; and that in the case at bar no definite ruling has been made and no Departmental policy of construction has been established in fact.

IV.

There Has Been No Congressional Construction of the Statute by a Reenactment Thereof After a Departmental Ruling.

The contention of the Government on this point is that the Departmental rulings, just reviewed herein, were extant at the time of the reenactment of the statute in 1921 and 1924, and that since the statute was reenacted without change Congress must be held to have adopted the Departmental construction.

The rule of law invoked by the Government is but a corollary of the rule, just discussed, that under certain circumstances Departmental rulings are given effect by the courts.

The corelative rules as stated in 2 Lewis' Sutherland, Stat. Const., 890 (2d Ed.) are as follows:

> "The Legislature is presumed to be cognizant of such construction [by those whose duty it is to execute a law], and after long continuance, without

> any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction. *And where the statute is reenacted without change, the presumption is strong that the Legislature intended it to bear the same construction that had previously been given it.*"

It may be noted in passing that the rule as to reenactment of a statute, like its corollary, is a rule of construction, and is applicable only where construction is permissible or required.

An examination of the principal cases cited by the Government in the Court below, and the two cases cited in this Court, demonstrates that they do not rule the case at bar.

McDonald v. *Hovey,* 110 U. S. 619, 629, related to the effect of *judicial construction* of a statute prior to its re enactment.

In *New Haven R. R.* v. *Interstate Commerce Commission,* 200 U. S. 361, 401, the court refers to the rule as a familiar one applying to a "construction which has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration." It appeared from the case that the rulings in question were promulgated by the Interstate Commerce Commission in 1890 and 1891. The case was decided in 1905.

In *United States* v. *Philbrick,* 120 U. S. 52, 58, it appeared that the practice of the Secretary of the Navy complained of originated in 1814 and continued unabated until 1835, when the practice was forbidden by statute. The Act of 1835 was repealed in 1866. The practice was thereupon renewed and continued until 1871, when the enact

ment of a new statute terminated it. The court said that since the practice had "been frequently exercised prior to 1835, without objection by the legislative branch of the Government; and since that Act as well as the one in 1866 is an implied recognition of the practice established in the Navy Department prior to 1835, we are not disposed, at this late day, to question the validity of the order of May 23, 1866."

The court also pointed out that the practice was specifically brought to the attention of Congress by a report transmitted to it by the President, by a subsequent report of the Secretary of the Navy, thereafter by a communication to the House Committee on Naval Affairs, and still later by a communication of the Fourth Auditor of the Treasury, and other reports.

The case of *United States* v. *Baruch*, 223 U. S. 191, involved an interpretation of the Tariff Act of 1890 which had been adhered to by the Customs officials up to and including the importation in question, which occurred in 1899. With such ruling extant Congress had in 1897 and two years prior to the importation upon which the question was raised, enacted a statute using the same terminology as appeared in the Act of 1890.

The case of *United States* v. *G. Falk & Bro.*, 204 U. S. 143, also involved the Tariff Act of 1890 and a construction thereof which was continuously followed down to the Tariff Act of 1897, when the provision in question was reenacted. The import duty to which objection was raised in the case arose upon imports after the enactment of the Tariff Act of 1897.

In *National Lead Co.* v. *United States,* 252 U. S. 140, the court said:

> ". . . when uncertainty or ambiguity, such as we have here, is found in a statute great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and to carry its provisions into effect,—especially where such construction has been long continued, as it was in this case for *almost forty years* before the petition was filed. . . . To this we must add that the Department's interpretation of the statute has had such implied approval by Congress that it should not be disturbed" (pp. 145-146).

In *Latimer* v. *United States,* 223 U. S. 501, the Tariff Act of 1883 had been construed by the Supreme Court in 1894. The provisions of the statute so construed were again employed in the Tariff Act of 1897 and the issue of construction arose in the case in 1912.

United States v. *Cerecedo Hermanos y Ca.,* 209 U. S. 337, involved the effect of Treasury decisions construing the Tariff Act of 1875. The Tariff Act of 1897 contained substantially similar provisions. The question of construction arose in the case in 1907 and the rule was applied upon the doctrine of the reenactment of the statute without change after it "had previously received long continued executive construction."

In *Komada & Co.* v. *United States,* 215 U. S. 392, a tariff act had received executive construction prior to 1894 as evidenced by numerous Department decisions. The statutory provision appeared also in the Tariff Act of 1897. The importation out of which the litigation arose occurred in 1904, when the rule was applied.

Compare these cases with the case at bar. We do not have here any long established practice interpretation or construction under Departmental rulings. The rulings to which the Government would ascribe the force and effect of law, to the exclusion of jurisdiction of the courts over the matter, were rulings made in the proceedings and with respect to the particular tax before the court in this case.

While these rulings were in the process of litigation and before the courts had passed upon the issue raised as to the construction of Paragraph (3), Congress reenacted the Paragraph. The rulings themselves were inconsistent and irreconcilable. What construction could it be claimed that Congress adopted by reenacting the statute? Merely that the claimant was taxable? Or that she was taxable under one of the two sections and that Congress did not know which? Or did Congress merely reenact Paragraphs (3) and (4) in the 1921 Act, without knowing anything about the construction placed upon them in the case of the claimant?

The fact that the rulings, the payment of the tax, the protest, the litigation, and the Congressional action were practically contemporaneous, precludes the presumption, necessary to the rule, that the Legislature was cognizant of the Departmental construction.

In the cases cited by Government counsel the construction had been in vogue for periods ranging from seven years to fifty years and was either specifically brought to the attention of Congress or had continued so long as to justify the presumption that it had knowledge thereof. In the case at bar, we have only conflicting rulings immediately contested in the courts, and a reenactment of the statute while such rulings are in process of litigation.

Under such circumstances, no presumption can arise that the rulings were brought to the attention of Congress or that it adopted any one of them. The case is utterly devoid of the characteristic features of the cases in which the principle has been enunciated and applied, and, therefore, cannot be brought within the rule.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 119

GEORGINE ISELIN, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The report of this case in the Court of Claims is found in 59 C. Cls. 654, and the opinion of that court is set forth in the record beginning at page 31.

JURISDICTION

The appeal is from the Court of Claims under Section 242 of the Judicial Code. That court, upon findings of fact, by judgment filed May 5, 1924, dismissed the petition of the appellant. (R. 34.)

The application for appeal was filed June 20, 1924, and allowed June 23, 1924. (R. 35.)

STATEMENT

The action was brought to recover the sum of $3,352.50, with interest, being the amount of a tax paid upon the sale of tickets entitling the holder

to the use of a parterre box at the Metropolitan Opera House, in the City of New York, during the Grand Opera season extending from November, 1919, to April, 1920. The tax was assessed pursuant to the provisions of Section 800 (a) of the Revenue Act of 1918, Act of February 24, 1919, c. 18, 40 Stat. 1057, 1120.

The tax was paid under protest, claim for refund was filed and rejected (R. 31), whereupon this suit was brought.

THE STATUTE

The material provisions of the statute are as follows (40 Stat. 1120):

> Sec. 800. (a) That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 700 of the Revenue Act of 1917—
>
> (1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission;
>
> * * * * *
>
> (3) Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 50 cents in excess of the sum of the established price therefor at such ticket offices plus the amount of any

tax imposed under paragraph (1), a tax equivalent to 5 per centum of the amount of such excess; and if sold for more than 50 cents in excess of the sum of such established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess, such taxes to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

(4) A tax equivalent to 50 per centum of the amount for which the proprietors, managers, or employees of any opera house, theater, or other place of amusement sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor, such tax to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

(5) In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement (in lieu of the tax imposed by paragraph (1)), a tax equivalent to 10 per centum of the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder, such tax to be paid by the lessee or holder; * * *

Similar provisions were contained in Section 700 of the Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, 318, except the provisions of Paragraph (3). That was new.

THE FACTS

Miss Iselin, the appellant, was the owner of 300 shares of the capital stock of the Metropolitan Opera & Real Estate Company, hereinafter called the Metropolitan Company (Finding I, R. 27), which owned the Metropolitan Opera House in the City of New York. (Finding II, R. 27.)

The Metropolitan Company, by lease which has been in operation for a number of years, leased the house to the Metropolitan Opera Company, the producing company, hereinafter called the Opera Company. The Opera Company, under the terms of this lease, agreed to reserve for the Metropolitan Company or such persons as it might designate, at every representation of Grand Opera given during the season, all the boxes situated in what is known as the parterre tier of the Opera House, and six free admissions were allowed for each of the boxes. (Finding III, R. 27.)

The Opera Company paid a yearly rent of $67,000, and covenanted to give a season of not less than 60 and not more than 70 regular performances in each year; while the Metropolitan Company agreed to pay the Opera Company a subsidy of $1,000 for each regular performance. (Finding III, R. 27.)

During the times material to this action the subsidy amounted to $70,000 for each season, which was duly paid. (Finding III, R. 28.)

This subsidy was provided by the stockholders of the Metropolitan Company pursuant to agree-

ments described in Findings V and VI, R. 28. In accordance with a by-law of the Metropolitan Company, each holder of 300 shares of its stock was entitled to a license to use a designated box upon the parterre tier at all performances of Grand Opera. (Finding IV, R. 28.)

In addition to being the owner of 300 shares of stock, Miss Iselin was a party to the subsidy agreements, and each year paid her assessments and was allowed the use of her box. In November, 1919, her assessment was $3,000. The Metropolitan Company has never realized any profit or paid any dividends to its stockholders. (Finding VIII, R. 29.)

During the season of 1919-20, Miss Iselin sold her box tickets for 47 performances for $9,525. (Finding IX, R. 29.)

The sale was made through an agent, who received a commission for his services. (Finding X, R. 30.)

On December 30, 1919, without protest, she made a return and paid the tax thereon under the provisions of Section 800 (a), Paragraph (5), said return being based upon an admission price of $60.00 for each performance, the established price at which boxes in the grand tier, the tier next above, were sold at the box office to the general public. (Finding XII, R. 30.) The grand tier boxes seat the same number of persons and are uniform in size with the stockholders' boxes, which are "substantially similar thereto."

(Finding XIII, R. 30.) (Note: In the lease Exhibit B, made a part of Finding III by reference (R 28), the grand tier is described as "the first or Grand Tier" (R. 15, paragraph 13; R. 16, paragraph 15.) On this tier is the box reserved for the directors of the Metropolitan Company and known as the "Directors' Box.")

Upon application by attorneys for the Metropolitan Company, the Commissioner of Internal Revenue, on December 24, 1919, made the following ruling (Finding XII, R. 30):

> And (*any*) stockholder of the Metropolitan Opera and Real Estate Company selling a ticket for admission to any of the boxes in question, whether direct or through the opera house box office, is subject to the tax imposed by paragraph (3) of this section of the statute and must mark such ticket in accordance with article 51 of the enclosed regulations. The basis for computing this tax is the difference between the established price of the box seat in the second tier for that performance, as determined by article 17 of the enclosed regulations, and the price for which the ticket is sold.

Complying with this ruling, the appellant made a return setting forth the transaction and paid to the collector the sum of $3,352.50, a tax equivalent to 50 per cent of the excess of said sum of $9,525, over $2,820 ($60.00 for each of the 47 performances). The suit is brought to recover the amount thus paid.

THE QUESTION AND CONTENTIONS

The question is whether the sale of tickets thus made by the appellant is taxable under Paragraph (3) of Section 800 (a) of the Revenue Act of 1918, hereinbefore set forth. The appellant claims that it was not; the Government, that it was.

In support of its contention the Government argues:

First. The appellant having sold the tickets for her box for an amount in excess of the established price at the ticket office for tickets to boxes substantially similar to stockholders' boxes, became liable for the tax under Paragraph (3) of Section 800 (a) of the Revenue Act of 1918.

Second. Congress having reenacted in the Revenue Acts of 1921 and 1924, without material change, the provisions of Section 800 (a), Paragraph (3), of the Revenue Act of 1918, must be held to have adopted the interpretation of those provisions by the Treasury Department and the Attorney General.

ARGUMENT

I

The appellant having sold the tickets for her box for an amount in excess of the established price at the ticket office for tickets to boxes substantially similar to stockholders' boxes, became liable for the tax under paragraph (3) of section 800 (a) of the revenue act of 1918

(1) The purpose of the statute

The manifest purpose of Congress in enacting the Revenue Act of 1918, as disclosed not only by Section 800 (a) but in the entire Act, was to raise

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from almost every possible source the enormous sums of money needed for the prosecution of the war. Very little escaped, and one of the sources deemed legitimate and probably fruitful was the tax on admission to places of amusement.

The statute plainly shows upon its face that Congress was mindful of the fact that admission tickets were sold both at the box offices and elsewhere; that they were sold even at the box offices at prices in excess of the "regular or established price"; that, when resold by others than the proprietors, they were sold at such prices as the traffic would bear, and that there was such a thing as a reasonable advance and such a thing as an unreasonable, speculative, and perhaps extortionate advance. The plain purpose of the statute was to impose a comparatively small tax upon the original sale to be measured by the regular or established price; to impose another small tax upon a resale at an advance regarded as reasonable, and to impose a large tax upon any resale at prices above the reasonable advance, and also a large tax upon an original sale, if that sale was made at a price in excess of the regular or established price.

The statute shows no intent to exempt from its operation any sale of tickets or any resale at a profit. Because Congress did not intend that the tax should be avoided through any arrangement between the proprietors of the place of amusement and those occupying such relations to the proprietors that they had the permanent use of boxes or seats, Paragraph (5) of Section 800 (a) was in-

serted, which provided for a tax equivalent to 10 per cent of the amount for which a *similar box or seat* was sold for each performance.

(*2*) *The application of the statute*

By reason of the fact that Miss Iselin, the appellant, was a stockholder in the company which owned the Metropolitan Opera House and leased it to the producing company, she became entitled to the use of a certain box in the parterre tier for all performances during the Grand Opera season. She therefore became liable to the tax under Paragraph (5). Recognizing this liability, and without protest, she made a return and paid that tax based upon an admission price of $60.00 for each performance (Finding XI, R. 30), that being the price charged at the box office for the boxes in what is known as the "grand tier." The grand tier is the tier above the parterre, and, obviously, the boxes in that tier are within the definition of "similar" boxes, inasmuch as they seat the same number of persons, are uniform in size with the parterre boxes which, as the Court of Claims finds, "are substantially similar thereto." (Finding XIII, R. 30.) That the "Directors' Box" is in the "grand tier" indicates that that tier is in no sense inferior to the parterre.

But thereafter, for reasons not disclosed and not important, she made a resale of the tickets for her box for 47 performances, receiving therefor the sum of $9,525. That sale was not made at the

ticket office but through an agent whom she employed to dispose of her tickets and to whom she paid a commission. (Finding X, R. 29, 30.)

This resale was strictly a business matter, a commercial transaction, and no different in principle, or under the law, from a resale of tickets at news stands, ticket agencies or by speculators upon the sidewalks. The Commissioner ruled that it was taxable under Paragraph (3) of Section 800 (a), because it was made elsewhere than at the ticket office, and at a price in excess of the established price of seats in boxes substantially similar to her box, and the price which she had herself returned as being the price for which similar boxes were sold. The price for similar boxes, thus established and returned, was $2,820, 47 performances at $60.00 each. The amount which she received was $9,525, and the difference $6,705. The 50 per cent tax upon that was $3,352.50. That amount she now seeks to recover. The only ground upon which she can succeed is the narrow one that there was no *established price at the ticket office* for her particular box, even though there was such an established price for other boxes found by the court to be uniform in size, seating the same number of persons and substantially similar.

We pass over any contention that Paragraph (5) of Subdivision 800 was intended to be exclusive of all other taxes imposed by this section. The purpose of Paragraph (5) was inclusive, not exclusive. The tax which it laid was "in lieu of

the tax imposed by paragraph (1)" and not in lieu of any other tax. No purpose is discoverable in the Act to exempt from its operations any resale of tickets or to create any favored class of ticket holders or ticket sellers.

Section 800 (b) of the Act provides in substance that no tax shall be levied under this title with respect to admissions all the proceeds of which inure exclusively to the benefit of religious, educational, or charitable institutions, etc.; but appellant does not claim that she comes within this *exception.* Her claim is for *exemption.* Where the provisions of an Act seem on their face to be of universal application, as here, one who claims exemption must show that the exemption is clearly defined and founded upon plain language. There must be no doubt or ambiguity of language used upon which the claim to the exemption is founded.

> It has been said that a well-founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power. [*Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146.]

See also *Hecht* v. *Malley,* 265 U. S. 144, 156.

It is to be observed that Paragraph (5) relates to the permanent use not only of boxes but of seats. If, instead of receiving the use of a box, the stockholder received tickets for six seats in the

orchestra of the Opera House, and the established price of orchestra seats was $5.00 each, and the stockholder should sell his tickets for $10.00 each, would it not be apparent that he was taxable under Paragraph (3)? Could it be claimed successfully that the resale was not taxable because the tickets for his particular seats, not being on sale, had no established price, when tickets for similar seats in the row in front, in the row behind, and adjoining his on either side were sold at the box office for $5.00 each? Such a claim would, we think, be clearly without merit. People cannot, by their own arrangement of small details, so easily defeat the purpose of an Act of Congress. The principle is the same in the case of boxes. Tax laws must be construed reasonably to carry out their purpose and intent (*Scottish, etc., Insurance Co.* v. *Bowland,* 196 U. S. 611, 629), and the obvious purpose of this statute would be defeated if escape from the tax imposed by Paragraph (3) could be effected upon the theory that there was no established price for the particular pieces of paper that admitted him to occupancy of those particular seats, though his seats were surrounded by other seats substantially similar upon which there was an established price.

(3) The opinion of the Attorney General

This question was submitted to the Attorney General by the Secretary of the Treasury. In opinion dated March 22, 1920, the Attorney Gen-

eral said in upholding the rulings of the Treasury Department, 32 Ops. Atty. Gen. 142, 144:

> Plainly, the purpose was to tax every person who sells admissions to a theater at a price in advance of that which is charged by the management of the theater for similar accommodations. Paragraph 3 imposes the tax upon every such sale made anywhere other than at the ticket office of the theater. It imposes a moderate tax upon the excess charged if the amount thereof does not exceed 50 cents per admission, and a heavier tax of 50 per cent if the amount of excess is more than 50 cents. Paragraph 4 provides for a straight tax of 50 per cent of all excess charged when the sale is made by the proprietors, managers, or employees of the theater. Under this paragraph it might, with force, be said that an owner of a box who arranges to have tickets sold at the ticket office of the theater would be chargeable with the straight tax of 50 per cent, regardless of whether the excess in charge amounted to 50 cents or more, but certainly it can not be said that by making such an arrangement he has escaped taxation altogether.

No purpose to exempt being apparent, it can not reasonably be inferred that Congress intended to tax small sums, ranging from a few cents to a few dollars, upon the sale of single tickets, and leave untaxed sums running into the thousands, as in the present case. Reduced to plain terms it would mean that Congress intended to impose a tax upon

one who bought a ticket for a performance at the Metropolitan Opera House for $3.00 and sold it for $4.00, and yet did not intend to impose a tax upon one who sold a box for the same performance for $300, when the established price of boxes sold to the general public, and substantially similar thereto, was $60.00. To support such a contention it is necessary to subject this legislation to unreasonable artificialities and refinement. Compare *Worth Brothers Co.* v. *Lederer,* Collector, 251 U. S. 507, *Carbon Steel Co.* v. *Lewellyn,* 251 U. S. 501, 505.

(*4*) *The opinion of the Court of Claims*

The Court of Claims gave much weight to the fact that the appellant herself, in making her return under Paragraph 5, fixed the price of her box at $60.00, or $10.00 for each ticket, and that such price, recognized both by the appellant and the Government, necessarily became the established price upon which to base the tax imposed by Paragraph 3. (R. 33.) That court said (R. 34):

> It seems to be the contention of the plaintiff that a price must be established by some person having the power of establishment. Who other than the plaintiff had the power to establish the price of a box, or seats in a box, over which she had absolute control? And so when it came to establishing a price for her box for purposes of taxation she acquiesced in the price.

It is true that she sold her box for the 47 performances for a price which was far in excess of the $60. But because she established one price at one time and another price at another time, can she thereby be relieved of taxation by alleging that there was no established price as required by the statute? If so, then the statute is nugatory, not only as to the plaintiff but as to all others who might have it in their power to establish prices for tickets at first one price and then another.

The statute must be construed in the light of reason and common sense, and it is not perceived why the plaintiff should be exempted from the tax imposed by paragraph (3). She sold the tickets and obtained for them more than 50 cents in excess of the sum of the established price. The intent and purpose of Congress was to impose a tax in just such a case, and the fact that the plaintiff paid another and a different tax upon a box which she owned can not excuse her from paying the tax. Nor does it seem a great hardship even if the $3,000 assessment paid by her is taken into consideration, for after paying the assessment on her shares of stock and the tax she has still something over $3,000 as the result of her ticket sales.

It might also be noted that, in addition, she had the privilege of enjoying the performances other than the 47 for which she sold her tickets.

(5) One of appellant's contentions

Under Point IV of appellant's brief (pages 23 et seq.) it is pointed out that, in computing appellant's tax under Paragraph (3), there is an inequality between her tax and the tax paid by those who resell their tickets after paying the tax under Paragraph (1); because in the latter case the amount upon which the tax is to be computed is found by subtracting from the selling price the sum of the box-office price " plus the amount of any tax imposed under Paragraph (1)." Inasmuch, therefore, as she has not paid any tax under paragraph (1), the amount upon which her tax is computed is proportionally greater.

It is not claimed, however, that this inequality is such as to render the statute void. Of course there is no such thing as absolute equality in the incidence of taxes, nor is that necessary. Plainly, there is sufficient difference between those who, by reason of their relation to the management, have the permanent use of boxes and seats in places of amusement, and those who purchase tickets occasionally, or who engage in the purchase and sale of tickets as a business, to justify different classification. *Knowlton* v. *Moore,* 178 U. S. 41; *Stebbins* v. *Riley,* 268 U. S. 137.

Of course the appellant paid no tax under Paragraph (1). The tax she paid was " in lieu of the tax imposed by Paragraph (1)." Read literally, Paragraph (3) does not permit, in computing the

tax under Paragraph (3), anything to be subtracted from the selling price except the established price " plus the amount of *any* tax imposed under Paragraph (1)."

The tax under Paragraph (5) is at the same rate as the tax under Paragraph (1), and is stated to be " in lieu of the tax imposed by Paragraph (1)." The tax which appellant paid under Paragraph (5), upon the tickets for 47 performances, was $6.00 for each performance, or $282.00.

It seems to the Government that an equitable construction of these provisions would permit a taxpayer, in making return under Paragraph (3), to claim the benefit of the tax paid under Paragraph (5), in lieu of the tax under Paragraph (1). If this had been done in the present case, it would have reduced the appellant's tax by $141.00.

It is to be observed, however, that the tax under Paragraph (3) is "to be returned and paid, in the manner provided in Section 903, by the person selling such tickets." Section 903, 40 Stat. 1123, requires the taxpayer to make monthly returns to the collector of the district, and the tax shall, "without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return." Evidently Miss Iselin, in making her return, did not claim the benefit of the tax paid under Paragraph (5). Perhaps she simply followed the literal language of Paragraph (3); perhaps the

amount was regarded as trifling, and perhaps it was overlooked. At any rate, the computation was her own, not that of the Collector, and no claim of erroneous or inadvertent computation of the tax seems ever to have been advanced, and even now there is no such claim made.

The case obviously was brought as a test case to determine whether stockholders of the Metropolitan Company were taxable under Paragraph (3). The sole contention has been, and is, that they are not, and the considerations set forth in Point IV of appellant's brief are advanced for the purpose of showing that that paragraph is not applicable, and not for the purpose of establishing an erroneous computation. Should the Court feel that an equitable construction of the statute permits the taxpayer, in paying the tax under Paragraph (3), to obtain the benefit of the tax paid under Paragraph (5), that construction would not be in conflict with the ruling of the Commissioner or of the opinion of the Attorney General. The ruling of the Commissioner of Internal Revenue (Finding XII, R. 30) was that the stockholders of the Metropolitan Company selling their box tickets were "subject to the tax imposed by Paragraph (3) of this section of the statute," and that the "basis for computing this tax is the difference between the established price" of the seats in the grand tier boxes and "the price for which the ticket is sold." This ruling defined the "basis" merely, and did

not attempt to point out any details of computation.

The rulings of the Commissioner, which were approved by the Attorney General, were as follows, 32 Ops., page 144:

> (1) The holder of a parterre box at the Metropolitan Opera House who sells to a third party his rights to the use of his accommodations at a price in excess of the box-office charge for the most nearly similar accommodations is liable to the additional tax imposed under paragraph (3) of section 800 (a).
>
> (2) The tax attaches whether the sale is made to a regular ticket broker for resale or to the purchaser direct through the agency of an officer or employee of the company.
>
> (3) The established price to be used as the basis for measuring the excess of price is that of the most nearly similar accommodations sold at the box office.

The opinion goes no further than to hold that the stockholders were subject to the tax imposed by Paragraph (3), and that the established price to be used as the "basis" was that of most nearly similar accommodations sold at the box office.

If the appellant has, as a matter of fact, returned and paid a tax slightly in excess of the proper one, it would seem to have been her own fault, and to have no real bearing upon the substantial issue involved.

II

Congress having reenacted in the revenue acts of 1921 and 1924, without material change, the provisions of section 800 (a), paragraph (3) of the revenue act of 1918, must be held to have adopted the interpretation of those provisions by the Treasury Department and the Attorney General

The ruling of the Commissioner of Internal Revenue which is now attacked and pursuant to which the tax in question was paid, was made on December 24, 1919. (Finding XII, R. 30.) Thereafter the question was presented to the Attorney General by the Secretary of the Treasury for his opinion, and he, in an opinion dated March 22, 1920, sustained the ruling of the Treasury. (32 Ops. Atty. Gen. 142.)

Since then there have been two general revisions of the revenue laws, the Revenue Act of 1921, Act of November 23, 1921, c. 136, 42 Stat. 227; and the Revenue Act of 1924, Act of June 2, 1924, c. 234, 43 Stat. 253. In each of these revisions, the provisions we are now considering were reenacted without substantial change. Revenue Act of 1921, Section 800 (a), 42 Stat. 289, and Revenue Act of 1924, Section 500 (a), 43 Stat. 320.

The reenactment by Congress, in these two successive revisions, of the provisions of the Act of 1918, in language which, so far as it imposes the tax, is identical, must be regarded as expressive of its satisfaction with and adoption of the provisions of the Act of 1918 as interpreted by the Treasury

Department and the Attorney General. *United States* v. *Falk & Brother,* 204 U. S. 143; *National Lead Company* v. *United States,* 252 U. S. 140, 146.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

DECEMBER, 1925.

○

SUPREME COURT OF THE UNITED STATES.

No. 119.—October Term, 1925.

Georgine Iselin, Appellant,
vs.
The United States.
} Appeal from the Court of Claims.

[March 1, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Metropolitan Opera House in New York City is owned by a corporation which leased it to the producing company. The use of all the parterre boxes was reserved by the lessor, with the privilege of six free admissions to each box at every performance. Before the passage of the Revenue Law of 1918, the lessor conferred upon Georgine Iselin, as owner of 300 of its shares, a license so to use a designated parterre box. During the season of 1919-20, being authorized so to do, she sold through a personal agent, the license to use her box for 47 of the 70 performances given during the season, and received therefor $9,525 net, after deduction of the agent's commissions. On the amount received Miss Iselin was assessed a tax of $3,352.50, under paragraph 3 of § 800(a) of the Revenue Act of 1918, Act of February 24, 1919, c. 18, 40 Stat. 1057, 1120-21. She paid the amount under protest and presented a claim that it be refunded. The Commissioner of Internal Revenue rejected the application, holding that the tax was payable under paragraph 4 of that Act.[1] Then, Miss Iselin brought this suit in the Court of Claims to recover the amount. A judgment dismissing the petition, rendered upon findings of fact, was entered March 5, 1924. 59 Ct. Cls. 654. The case is here on appeal under § 242 of the Judicial Code.

Paragraph 3 of § 800(a), under which the tax was assessed, provides:

[1]Paragraph (4) provides: "A tax equivalent to 50 per centum of the amount for which the proprietors, managers, or employees or any opera house, theater, or other place of amusement sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor, such tax to be returned and paid, in the manner provided in section 903, by the person selling such tickets."

"Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 50 cents in excess of the sum of the established price therefor at such ticket offices plus the amount of any tax imposed by paragraph (1), a tax equivalent to 5 per centum of the amount of such excess; and if sold for more than 50 cents in excess of the sum of such established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess, such taxes to be returned and paid, in the manner provided in § 903, by the person selling such ticket."

Neither stockholders' boxes nor tickets to them were on sale at any ticket office, as all the parterre boxes were reserved by the lease for the stockholders. For this reason there was no regular or established price for parterre boxes. Nor was any other box exactly like them on sale. Each sale of a stockholders' box or tickets was made as the individual transaction of a particular stockholder, for a particular performance, and to a designated purchaser. The price paid varied widely for different performances. There was, above the parterre boxes, a tier of boxes, known as the grand tier. These boxes, which were on sale at the ticket office, also had seats for six persons, were uniform in size with the stockholders' boxes, and were otherwise similar. The ticket office price for grand tier boxes was $60 for each performance. The Commissioner of Internal Revenue, though sustaining the tax under paragraph 4, assessed the tax under paragraph 3, apparently on the theory that Congress intended to tax sales of boxes like the plaintiff's; that, since there was no "regular established price or charge" for boxes exactly like hers and no such boxes were sold at the ticket office, the basis for taxation should be sought in the established price for the class of boxes actually on sale most like hers; that it should, therefore, be assumed that the box office price for the similar grand tier boxes was the "established price at the ticket offices" of parterre boxes; and that, with such price as a standard, the calculation involved in determining the item of "any tax imposed by paragraph (1)," and in assessing the supertax under paragraph (3) should be made.[2]

[2]Paragraph (1) provides:

"A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place . . including admission by season ticket or subscription, to be paid by the person paying for such admission."

Miss Iselin contended that § 800(a) had no application to stockholders' boxes or tickets; that the section provided for a tax only on the tickets customarily sold at box offices, for which there is an established price there, and which are commonly sold at news stands, hotels and other places of business for higher prices; that it was the purpose of Congress to impose a small tax upon tickets sold at the ticket office, a moderate tax on those sold at a moderate advance over the ticket office price, and a large tax upon any resale of admission tickets if made at a price above a reasonable advance on the regular price, and also a large tax upon an original sale, if made at a price in excess of the regular or established price; that tickets issued under the peculiar circumstances stated, which were received by her as an incident of her investment in the lessor company and in return for obligations assumed by her as a stockholder to ensure performance of operas, were not within the purview of the section; that she was not taxable at all, since her tickets had not been sold at a box office and there was no established price for them; but that if taxable, it could be only under paragraph 5, under which she had without protest paid a tax on these tickets amounting to $242.[3]

The Court of Claims held that the tax was properly assessed under paragraph 3. It concluded that there was an "established price" for box tickets of this character, and that Miss Iselin herself had established the price, because, prior to the assessment to her of the tax here in question, she had paid without protest a tax assessed under paragraph 5, the amount of which the Government had determined by fixing $60 as the established price on which the tax so paid was calculated. The court held that the term "established price" did not imply a fixing of the price by the producing company or others having the general power of establishing the prices of tickets; that it was of no legal significance that plaintiff had in fact made no sale at the price fixed in the assessment, that she had actually sold the tickets for the different performances

[3]Paragraph (5) provides:

"In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement (in lieu of the tax imposed by paragraph (1)) a tax equivalent to 10 per centum of the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder, such tax to be paid by said lessee or holder; and"

at widely varying prices, and that no sale had been made of such tickets at the ticket office.

The Government concedes that neither paragraph 1, paragraph 3, paragraph 4, paragraph 5, or any other paragraph[4] of § 800(a), provides in terms for taxing a privilege like that enjoyed by the plaintiff. It makes no contention here that the tax can be sustained under any paragraph of § 800(a) unless it be paragraph 3. It argues that Congress clearly intended to tax all sales of tickets; that there is in the section no indication of intention to exempt from the tax any sale of tickets or any resale at a profit; that the receipts here taxed are in character substantially similar to those specifically described in paragraph 3; that this general purpose of Congress should be given effect, so as to reach any case within the aim of the legislation; and that the Act should, therefore, be extended by construction to cover this case. It may be assumed that Congress did not purpose to exempt from taxation this class of tickets. But the Act contains no provision referring to tickets of the character here involved; and there is no general provision in the Act under which classes of tickets not enumerated are subjected to a tax. Congress undertook to accomplish its purpose by dealing specifically, and in some respects differently, with different classes of tickets and with tickets of any one class under different situations. The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax, were specified, preclude an extension of any provision by implication to any other subject. The statute was evidently drawn with care. Its language is plain and unambiguous.

[4]The remaining paragraphs, so far as they impose a tax, are:

(2) In case of persons (except . .) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, a tax of 1 cent for each 10 cents or fraction thereof of the price so charged to such other persons for the same or similar accommodations to be paid by the person so admitted;

(6) A tax of 1½ cents for each 10 cents or fraction thereof of the amount paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service, or merchandise; the amount paid for such admission to be deemed to be 20 per centum of the amount paid for refreshment, service, and merchandise; such tax to be paid by the person paying for such refreshment, service, or merchandise.

What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. Compare *United States* v. *Weitzel*, 246 U. S. 533, 543; *Peoria & Pekin Union Ry. Co.* v. *United States*, 263 U. S. 528, 534, 535.

The Government calls attention to the fact that, as early as October 24, 1919, the Commissioner of Internal Revenue made the ruling pursuant to which the tax here in question was assessed; that on March 22, 1920, the Attorney General sustained that ruling; that the provisions here in question were re-enacted without substantial change in the Revenue Act of 1921, Act of November 23, 1921, § 800(a), c. 136, 42 Stat. 227, and the Revenue Act of 1924, Act of June 2, 1924, § 500(a), c. 234, 43 Stat. 253; and that the administrative practice adopted in 1919 has been steadfastly pursued. It suggests that these facts imply legislative recognition and approval of the executive construction of the statute. But the construction was neither uniform, general, nor long-continued; neither is the statute ambiguous. Such departmental construction cannot be given the force and effect of law. Compare *United States* v. *Falk & Brother*, 204 U. S. 143; *National Lead Co.* v. *United States*, 252 U. S. 140, 146.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.